United States Court of Appeals

for the Second Circuit

APPENDIX

75-7538

United States Court of Appeals

For the Second Circuit

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ALAN L. SPIELMAN,

Plaintiff-Appellant,

against

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, ALLEN & COMPANY, KLEINER, BELL & COMPANY, INCORPORATED, SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,

Defendants,

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WESTON E. HAMILTON, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, and ALLEN & COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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ALAN L. SPIELMAN

v. 73 CIV 573 EW

GENERAL HOST, et al

April 16, 1975
10:30 a.m.

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(Trial resumed.)

THE COURT: Now that you have had all night to gird your loins, are you all ready?

MR. McAMIS: Ready.

MR. WEISS: I would like to get a stipulation from the defendants that the confidential report referred to in stipulated fact number 28 is also referred to, from time to time, as the Armour study or the black book.

MR. McAMIS: I have no trouble stipulating to that, your Honor. I'm not sure that it has been referred to in any evidence here, but it was from time to time. I have no trouble with it.

MR. GOULD: I will stipulate that there are references to it which refer to that item.

THE COURT: There were references.

MR. McAMIS: Not in depth.

MR. DUFF: We will stipulate also, your Honor.

THE COURT: I think Mr. Weiss in his question said, "the so-called black book."

MR. WEISS: That is correct.

I would also like to read in two very short portions of a deposition.

THE COURT: I thought that you rested your case yesterday.

MR. WEISS: Your Honor, I read the transcripts we have been getting on a daily basis and I hurriedly tried to cut down all of this.

THE COURT: In other words, you say you want to reopen the case?

MR. WEISS: Just for a few very small items.

From the Glynn deposition on page 162:

"Q Is it fair to say that if the historical records of earnings of General Host were followed in the pro forma cash flows for 1969 and 1970 that General Host would not have enough available to pay for the various obligations created under the 7 per cent debenture?"

MR. GOULD: I am going to object to the question, if your Honor please, because I think it is so phrased that it could not possibly elicit anything of probative value. I don't know what the word "followed" means here.

MR. McAMIS: I join in that objection, your Honor. I simply say it is an improper question.

MR. WEISS: Your Honor, all objections at the depositions were preserved except as to form and there was no objection at that time.

MR. GOULD: I think you can raise an objection as to form if you read what happened after that. The witness didn't understand it and there is no response to it.

MR. WEISS: There are only two questions there and there is no objection and I want to read those two.

MR. GOULD: I will withdraw the objection.

MR. WEISS:

"A You are saying that it was the 1967 or 1968--which year?

"Q I am saying if the historical standard were followed. I am trying to follow what you said.

"A That is right."

Your Honor, you raised a question yesterday or posed a question concerning the Chris-Craft decision and the interchangeable use of the descriptions First Boston here as dealer-manager or as underwriter. I have the record on appeal in that Chris-Craft case and I have the prospectus that was in issue in that case.

THE COURT: I only asked you whether the emphasis so far as imposing liability on First Boston was concerned was on the fact that it was an underwriter. That is all I asked.

MR. WEISS: That is what I am getting to, that the only role that First Boston played in that situation was as a dealer-manager and the Courts in effect held that a dealer-manager is an underwriter and used the phrases interchangeably.

The prospectus indicates that First Boston was a dealer-manager and, indeed, almost the exact language that is present in the prospectus in this case exists in the Chris-Craft decision, the Chris-Craft case. I would like to offer this in evidence. It is the record on appeal.

THE COURT: I am not taking that in evidence. Please, there are limits to what is admissible evidence in a case. If I think it is important I can take judicial notice of it. It is an official record of this Court.

MR. WEISS: All right.

THE COURT: I asked a simple question. I didn't expect to get a thousand page printed record in response to it.

MR. WEISS: I'm sorry, your Honor. I just

wanted to be responsive.

MR. GOLDSCHMID: There was a point made yesterday on the Scienter standard in the new Chris-Craft case. I assume you have that before you. Did you hand that up, Mr. Weiss?

MR. WEISS: No, I didn't. I assumed we would argue that on the motion to dismiss.

MR. GOLDSCHMID: I just might note that in Footnote 30 the Second Circuit's Judge Timbers has said that recklessness is a Scienter standard. I think he made that clear. Footnote 30 of that opinion indicates that Chris-Craft stands for Lanza and Lanza stands for Chris-Craft.

MR. McAMIS: If you want me to proceed, as I indicated at the adjournment yesterday on behalf of the clients I represent, I will, your Honor. I have motions to strike and to dismiss for failure on the plaintiff's part to present a prima facie case in his case in chief.

Could I ask the Court whether you want me to argue my motions now or do you want to have a statement from other counsel of their motions at this time?

THE COURT: I can only hear one counsel at a time. If you are arguing your motions, presenting your arguments, how can I shift to other counsel?

Commission Expires March 30, 1977

MR. McAMIS: Very well, your Honor. My motions to strike relate to two pieces of testimony from the depositions of two General Host officers, Mr. Day and Mr. Glynn, and both of them, both of those pieces of testimony relate to the same subject matter, which your Honor admitted subject to a motion to strike if there was no connection made with the events leading up to the prospectus.

The events concerning which Mr. Day and Mr. Glynn were testifying related to attempts by Host to obtain financing to borrow money in April 1969. As your Honor will recall, the prospectus is dated January 30, 1969. The trial transcript references for the Day testimony that I am talking about are pages 126 to 130, and for Glynn it is at page 231, your Honor.

THE COURT: Let me get one at a time. What is the first one?

MR. McAMIS: The Day testimony at 126 to 130.

As you see at the bottom of that page Mr. Day is asked about the study that he had done in March or April at the request of Mr. Ashton and--

THE COURT: The bottom of what page?

MR. McAMIS: The bottom of page 126 of the trial transcript.

THE COURT: Go ahead.

MR. McAMIS: Do you have it, your Honor?

Mr. Day then proceeds to refer to the analysis that he prepared at that time and proceeding on to page 128 his analysis was embodied in a report which indicated that Host needed between $40 million and $50 million for financing if Host were forced to wait three years before it obtained control of the board of Armour.

Then that proceeds to a discussion of cash flow projections and why that financing was needed, and I submit, your Honor, that in no place in that testimony is there any evidence that this need was anticipated in January 1969 or that this study was anything that proceeded from a perceived need in January 1969.

Therefore I say that the testimony as to that April event has not been connected by the plaintiff to anything that could be related to the state of mind of the participants at the time the Host registration statement of January 30th was prepared. That is the basis of my motion.

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The Glynn testimony is, I believe, at page 231, your Honor. Mr. Glynn was asked at the bottom of page 230 whether he participated in the preparation of a report in either March or April, 1969 that would deal with the cash requirements of General Host, taking into account the fact that General Host elected only two directors -- according to the transcript it is actually four directors -- of the board of directors of Armour and did not have a majority of representatives on that board.

Then there is the objection and the court's ruling that it would be taken subject to connection, on page 231, and the inquiry proceeds.

It is the same subject matter as that of Mr. Day and I submit that it should be stricken for the same reason and that is that the plaintiff at no point in this case elicited testimony from any witness tending to indicate that this financing or this study, which was done in April, 1969, was anything that was contemplated by the parties at the time of the events that are at issue in this lawsuit.

The motion to dismiss that I have, your Honor, proceeding to that, relates to all the issues in this lawsuit, and the best roadmap that I have as to

those issues as set forth in the pretrial order and in plaintiff's pretrial memorandum, indicating, I suppose, what he set out to show, and I propose to go down that list and contrast it with the evidence that actually came in on the plaintiff's case in chief.

Going for a moment to item A, I made the objection yesterday with respect to item A and certain other items that the contention raised there had only been raised for the first time at the time the plaintiff's pretrial formulation of the issues was put in, just prior to the pretrial order. I won't belabor that point because I know your Honor has it in mind.

MR. WEISS: Excuse me, your Honor. I think I can save time. I will withdraw certain contentions made in the pretrial order as we go along. This is one of them, this item A.

MR. MC AMIS: That will certainly shorten my argument.

THE COURT: I wonder if you can't pinpoint this more in terms of your claims as I understand them and the proof that you offered in support of your claims.

As I understand it, you limited your contentions -- or let me withdraw the word "limited" -- your

contentions with respect to two matters. Am I right about that?

MR. WEISS: Or two types of matters.

THE COURT: One is a failure, I owuld put it, to emphasize or set forth the problem with respect to not obtaining effective operating control because of the staggered board of directors and cumulative voting.

Is that one claim.

MR. WEISS: Yes, your Honor.

THE COURT: What is your second claim with respect to the pro forma statement and the historical facts.

MR. WEISS: Well, basically that the pro forma statement, when taken together with the statements on other pages of the prospectus, adds to the illusion that General Host will have the immediate availability or possibility or right to use Armour assets to take care of any cash requirements it might have in the future.

In other words, the manner in which it is presented without a caution -- without any cautionary language, is misleading.

THE COURT: When you say events, are you

referring to the inability to pay interest on the debentures and the interest on outstanding loans?

MR. WEISS: To pay any kind of debt requirements. The defendants themselves strongly urge that Armour and the opposition were making a big fuss about General Host's ability to take care of its debt in the future, and I say that the language on page 9, the language that I read from the other section on the anti-trust -- they are all on page 9 -- together with the combined statement immediately following it, has the effect of giving the Armour shareholder a sense of comfort that even if these attacks are true, that Host can handle them in a certain way. What is that certain way?

Well, we can raise Armour's --

THE COURT: Well, I just want you to keep on the issues.

MR. WEISS: The second issue is that they didn't state in the prospectus that they were relying upon projections to meet their interest or debt servide as it became due.

MR. GOULD: Just a minute.

Your Honor, that's the first time we have ever heard that enunciated as a claim in this case.

We didn't say we were relying on that as a --

MR. WEISS: I stated that in my opening.

MR. GOULD: I thought he stated something different from what he is now saying. I don't want to argue it now.

MR. MC AMIS: Well, let me have a crack at it, your Honor. The issues keep changing -- I agree with Mr. Gould -- but let me deal with the problem relating to control.

Mr. Weiss, as I understand it, attacks basically the language on 99 of the prospectus, which he says, combined with the pro formas, led to the creation of an illusion, to use his words, that we would be able to get control right away.

I point out, your Honor, to begin with, that Mr. Weiss can't find any place in the text or anything in the prospectus where there is any statement made that Host would get immediate control. There is no language to that effect. What he is talking about in terms of an illusion or a subjective reaction, if you will, to this prospectus, I submit is far too ephemeral a basis on which to impose ruinous liability on a registrant when he can't find any place that Host ever said it was going to get immediate control.

In fact, the evidence before your Honor indicates that everybody knew that Armour had a staggered board and cumulative voting, the prospectus so states. It states that in a place where all information about Armour is contained, and that's in the annex to the prospectus, which is cross-referenced at page 10. The reader is asked to look at that annex.

We would certainly stipulate that Host knew all along that Armour had a staggered board and cumulative voting. We submit that this was no news to anybody else who was involved in this process, including the Armour shareholders to whom the offer was directed.

Based on the evidence that is already before your Honor, that becomes manifest.

Mr. Weiss put in on his case in chief the record on appeal from the Justice Department's proceeding against General Host in Chicago, and as part of that record there is an affidavit of Harris Ashton which your Honor has had occasion to comment on the other day, that is, the comment on the paragraphs of the affidavit in which Mr. Ashton is saying that even if General Host is successful in its exchange offer and obtains at least 51 per cent, that General Host has no assurance that it will immediately obtain a numerical majority

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on the board of Armour and, indeed, that appears not to be possible.

THE COURT: Well, Mr. Weiss' contention is that the decision that was made in the Chicago suit should have been lighlighted in the prospectus.

MR. MC AMIS: Well, your Honor --

THE COURT: What is your answer to that?

MR. MC AMIS: My answer is twofold. In the first place, the existence of the staggered board and cumulative voting is stated in the prospectus. Not everything can be on page 1. And after all, this was in a context, your Honor, where the evidence indicates that the people from a practical business point of view knew that they had no assurance of getting a numerical majority on the board of directors but didn't equate that in their individual discussions with the inability to gain control and various options as to what they thought might happen are before you.

In addition, what is before you is concrete evidence in the form of exhibits to Mr. Ashton's affidavit that Armour was also advising its shareholders to remember the staggered board and the difficulty that that might create for Host in obtaining control.

As your Honor pointed out in colloquy the

other day, shareholders in a corporation may be expected to know what the voting rights in that corporation are. But Armour's management, just in case anybody had forgotten, took care to see that they were well reminded, and I point to the exhibit to Mr. Ashton's affidavit which is in evidence, consisting of the letter to Armour stockholders, sent by Mr. Prince, dated January 9, 1969, and which also appeated that day as a full-page advertisement in the Wall Street Journal, in which reference is made to the staggered board.

Let me read the pertinent language:

"For so long as there continued to be any public stockholders of Armour, even if General Host were in control of Armour's board of directors, which is classified as elected for three-year terms, General Host couldn't use Armour's assets and cash flow except by the declaration of dividends to service General Host's indebtedness."

THE COURT: Well, that's a statement by Armour to its stockholders.

MR. MC AMIS: Right, who were the objects of the exchange offer.

THE COURT: All right. But assuming that General Host was required to or should have specified

more precisely the difficulty of obtaining operating control, even though they owned 51 per cent of the stock, with the fact that General Host omitted to include the statement, can that be rectified by the circumstance that Armour notified its stockholders?

MR. MC AMIS: In the first place, your Honor, my answer is that there wasn't any omission.

THE COURT: I say, assuming that there was a material omission and a failure to say exactly what Mr. Ashton said in the Chicago suit, that "The fact that we have 51 per cent doesn't mean that we can immediately obtain effective operating control," or whatever his precise language was. I suppose Mr. Weiss is going to argue that that's what should have been put in the prospectus.

Assuming that is so and that General Host failed to do so, would the fact that Armour & Company supplied that very information to its stockholders eliminate any potential liability on the part of General Host?

MR. MC AMIS: That is certainly my understanding and my argument to you, your Honor, as to the correct interpretation. There have been cases -- and I am thinking most recently of the decision of Judge

Friendly in the Missouri-Portland case, which is cited in the defendants' pretrial memorandum, in which he says expressly that in a contested situation certain facts can be left for riposte by the other side.

THE COURT: You say it doesn't make any difference how it came to the attention of the stockholder, as long as they have the information?

MR. MC AMIS: That's right, your Honor.

THE COURT: What you are saying here is that the substance of the statement made by Mr. Ashton in the Chicago suit was actually transmitted to the Armour shareholders by Armour in resisting the takeover by General Host.

MR. MC AMIS: Absolutely, and that was done many times over.

THE COURT: I just want to make sure I understand your argument.

MR. MC AMIS: But of course I am taking for argument your Honor's assumption.

THE COURT: Yes, I say it's a hypothesis.

I am sure counsel understood that they were not to draw any inferences from the question.

MR. MC AMIS: I might point out that there is also in evidence before your Honor as another exhibit

to the Ashton affidavit a document which is the January 17th Armour proxy material to its own shareholders for its own forthcoming annual meeting, and that proxy material also makes it plain to those shareholders that six directors out of 17 are up for election. So there are two instances already in evidence before your Honor where that information was made.

Moreover --

THE COURT: Pardon me. What is the date of the first one? You say the last one is January 17th?

MR. MC AMIS: The date of the first one, the advertisement and the letter to Armour shareholders, is January 9th. So it preceded it.

THE COURT: I have a vague recollection -- correct me if I am wrong -- that the publication really was a copy of the letter to shareholders.

MR. MC AMIS: That's correct. In fact, the publication begins with the words "To Armour Stockholders" and it is signed by William Wood Prince, Chairman of the Board, and it is the text of the letter that was mailed to the Armour shareholders.

THE COURT: Now, what statement is contained there with respect to the staggered board?

MR.MC AMIS: This is in the advertisement, your Honor?

THE COURT: Yes. I say it's the same as the letter.

MR. MC AMIS: It's the same as the letter, and I referred to the staggered board, that is, just elliptically, Armour's board of directors is classified and elected for three-year terms.

Then Mr. Prince addresses the matter of cash flow. This is late in the text, because he spent about two-thirds of it r citing that Sullivan & Cromwell and Kirkland, Ellis agreed with their view of the Justice Department suit and that ought to knock out General Host. But then he gets around to financial considerations and he says that -- he goes through General Host's earnings, and then he says:

"But these figures do not mean that General Host would have the cash flow necessary to service its greatly increased debt," that is, the General Host earnings figures which he has just referred to.

Now, that information went to Armour share - holders the 9th of January. The proxy statement, again referring to the staggered board, went out the

17th. Those are in evidence and properly for your Honor's consideration, and I say that they, without more, plus the disclosure in the prospectus, indicates that there was no material omission, and, if I may, I will make the further point that it seems to me that the disclosure in the prospectus, even if it is regarded as, say, not being up front, not being as prominent as in hindsight perhaps one would have liked to see it, is (a) nevertheless in a logical place and (b) the fact of that disclosure, it seems to me completely eliminates any idea that there was any intent to deceive or any recklessness. The fact was there and it seems to me to be inconsistent with the disclosure of the fact to say that people were reckless when the fact is there for all to read.

Certainly it is inconsistent with its intent to deceive or recklessness, and I say that there's no material omission.

I would just like to refer to one other aspect of the language on page page 9, which goes to to the issue of disclosure, and that is, as has been pointed out earlier in this trial, the Justice Department lawsuit was closed, and even thought by the time the prospectus was out that lawsuit had been won in Judge

Hoffman's court, reference is made to the possibility of an appeal and the uncertainty that that possibility created, but any Armour shareholder who wanted to know more about that lawsuit plainly had enough to invite him to go back inquiry.

If I may just --

THE COURT: Well, that lawsuit only related to the Packers decree, did it not? That is the one in which the affidavit was submitted?

MR. MC AMIS: That is the one in which the affidavit was submitted and it was submitted on a preliminary injunction motion in an effort by the Justice Department to enjoin under the Packers decree, but the language that Mr. Ashton refers to is there and it was there in support of General Host's position at the time which was that if control of Armour is a vice under the antitrust laws, which we deny, nevertheless the court should not preliminary enjoin this offer, because even if we get 51 per cent Host knows that it won't be immediate control and you can take care of making us sell later if we prove to be wrong on the law, but it would impose great damage and hardship to have a forced sale of 16-1/2 per cent. It would eliminate or reduce that hardship if we had 51 per cent to sell in the event

we were wrong on the law.

Of course, as things turned out, based on Judge Hoffman's decision, there was no problem from the Packer's consent decree point of view with Host controlling Armour.

The evidence concerning the pro formas, your Honor, is completely that these pro formas are required. No witness has gotten on the stand to say that they were improper in form or content.

Bettauer testified that he had looked at them. Glynn testified through his deposition that these were prepared in customary form and nobody has gotten on the stand to gainsay them.

THE COURT: What page do they appear on?

MR. MC AMIS: Those are the pro formas that begin really at page 14, your Honor.

MR. WEISS: First, on page 11, they start with pro forma exchange offer on General Host's per share book value, and they start immediately.

On page 10 all the pro forma treatment is started.

MR. MC AMIS: Now, the basic pro forma and page 14 is a pro forma statement of income, that is, profit and loss. It is not a cash flow statement,

and no table or statement of cash flow as such appears in the prospectus, although the witness Bettauer said that such information could be derived, and the point that I think is appropriate here on this motion is that there was no representation anywhere in the prospectus -- and plaintiff can point to none -- in which Host said that it will pay the interest on the indebtedness it proposes to incur out of cash flow. Indeed, the evidence indicates that Host had cash flow projections indicated January 30th. They were put in by the plaintiff through Mr. Day, and those cash flow projections demonstrated that Host had sufficient cash flow on a projected basis to service the indebtedness to the debentures and meet its other obligations for the next two years: 1969 and 1970.

Those cash flow projections are in evidence before you, and they indicate positive cash flow, but there is no place that Host ever indicated in the prospectus that it would be limited to making payments of its interest indebtedness to cash flow. Indeed, the language on page 9 clearly indicates that Host had in mind other possibilities that might make either necessary or desirable and I refer your Honor to the last full paragraph on page 9 which each of the wit-

nesses has been asked about and which indicates steps that Host may take following the conclusion of its exchange offer, and among those steps is the statement that Host may find it necessary or desirable to increase the dividend paid on common stock by Armour or to incur new indebtedness or issue additional equity securities, a clear statement to Armour shareholders that it may either borrow new money or issue new equity.

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Now, either one of those devices would have raised cash, so there was no representation that Host was limited to its own cash flow from operations in order to meet its debt obligations and, indeed, the suggestion is made expressly that it may find it necessary or desirable to do one of the other things mentioned here on page 9.

There has been no indication that such steps were not feasible if they were sought or if they ultimately came to be considered and the idea that there is some creation of illusion from the pro formas that we could pay the interest on the indebtedness out of cash flow is just contrary to the express language of the prospectus. There isn't any cash flow statement. There isn't any representation and it probably doesn't make any difference to the Armour shareholder where Host gets the money as long as it pays the indebtedness interest to him, and, indeed, the language is to the contrary on page 9.

In summary, I think the [illegible] has come before this Court indicates the validity of the point that I made in opening, that this really is nothing more than the trial on the merits of the Armour and McCaw, Kelley action which came before this Court on preliminary injunction motion in 1969.

Plaintiff has not shown that there is anything

new that has been learned since 1969. He hasn't shown that any fact that was then in existence was concealed. Indeed, the evidence that he has put in demonstrates the contrary and the only question comes down to one of interpretation as to whether something that was said might have been said differently or might have been said better.

But I say that plaintiff has completely failed to prove that anything in the prospectus is a misrepresentation or material omission on either of the two issues that he has tendered.

Not only is there no proof that there is any such misrepresentation, but even if there is some doubt in the Court's mind on that at the close of plaintiff's case, I think there can be doubt on the issue that plaintiff also must surmount in order to impose liability and that is the issue of recklessness.

Everything in the record so far on the plaintiff's case in chief indicates, I believe in sufficient detail, to grant a motion to dismiss that these were prudent people who put in language, who perceived problems correctly, who were aware of the possibilities and who tried to put in language to cover those possibilities, and plaintiff has tried to pick apart this language and to show that there is something wrong with it and he has

found this jot and that tittle, but I submit that the gossamer nature of what he is doing there is demonstrated by the casual nature of the claims he raised at the last minute and the casual nature with which he has abandoned many of his specific points and never even made any attempt to show that there was inadequate disclosure, because upon reading our pre-trial brief he found out that some things he said were not disclosed or indeed disclosed in the prospectus.

So that for that reason, your Honor, I submit that there is no material omission. There certainly is no recklessness as required by the cases in this Circuit, and on behalf of my clients I seek a dismissal.

MR. GOULD: If your Honor please, I associate myself in all respects with Mr. McAmis' motion and his comments on the plaintiff's case.

Before I address myself--and I will try not to rehash things that have been covered by Mr. McAmis. I think I have a few contributions to make, however.

First of all, your Honor may recall that at one point, and I am referring to material which appears at the bottom of page 69 and 70 of the transcript, I objected to Mr. Jenner's statement, and then I think in the exuberance of oratory Mr. Weiss said that, "It will

be subject to connection if I could prove a conspiracy aginst him."

And I think it is appropriate at this time to refer to that because far from proving a conspiracy among the defendants in this case, what he has proved is a concurrence of reasonably intelligent, able, prudent people acting like intelligent, prudent people with the help and guidance of seasoned professionals, with the concurrence of the most sophisticated agency that I know about, with four decades of expertise in the very field we are engaged in and then he says, well, now they were reckless.

Despite all this, they were reckless. That is what I will address myself to because that is the standard that they have to be measured against, whether they were reckless.

I don't think there is the slightest suggestion anywhere that the standard is different from one of recklessness. We know what recklessness means. Let me come back to it. Let me see if we can measure these people against the standard of recklessness.

There is one aspect of this case, your Honor, which has astonished me from the moment we started and that is that as the proof came in, we sitting here at the counsel table for the defendants identified virtually every

item of proof that was offered in support of the hypothesis of recklessness on the part of the plaintiff. We recognized every single one of them as something we would have offered as a demonstration of care, as a demonstration of prudence. We listened to the depositions of these financial fellows, Day, Glynn. We couldn't have done better. These are honest men acting like honest men.

These are not only honest men. Where they need professional advice they seek the professional advice and they get it. When they need consultation with the Securities and Exchange Commission, they get it.

And then an accident happens in this case, one of these advantageous things. The learned firm of Sullivan & Cromwell makes an attack on this very document before this very Court, an attack spearheaded by one of the Olympian figures of securities law, Mr. Dean, who thought he had to remind your Honor at one point in this transcript that he was one of the authors of the statute.

By the way, Sullivan & Cromwell in making the attack on this thing doesn't even refer to the staggered board, and I have no trouble as a seasoned lawyer in matters of this kind in figuring why they didn't make the attack--because it was a contemptible attack.

It is the kind of attack that is made on a

document of this kind only by a plaintiff who is desperate for something that survives professional scrutiny. It is indeed a contemptible act. It is a demonstration, your Honor, that it has become the fashion in these cases long after the event by the invocation of second guessing, hindsight, Monday morning quarterbacking to come in and say: Well, we found something wrong, and I must say with a certain degree of envy and a certain degree of admiration, it has been an extremely profitable pursuit.

B2 To come in long after the event, go through the document and pretend that we are, all of us, engaged in some kind of a fatal game of Russian roulette, and if you leave something out or you don't twist the comma the right way say: Pay me a couple of million bucks because it is a lot cheaper to pay me than to fight it out. And somewhere we have to draw the line. Somewhere we have to stand up and say we will not go on paying these people just because they found a comma bent the wrong way.

I remember the language that was used in the Third Circuit in a situation comparable, that a certain degree of reasonable latitude, of course, is important, "Unless," says the Judge over there, "nit-picking is to [illegible]"

become the name of the game and that nit-picking is the name of this game and the nit-picking has come down to two points, one the staggered board and one the cash flow.

Now, let us examine analytically the nit-picking on the staggered board. I concede, your Honor, that all of the issues on this problem are confined to the paragraphs after the subheading "Other Aspects of the Exchange Offer," on page 9, and then the perfectly understandable annex in which they describe everything about our merger at page A-10.

Now, let's see if this isn't nit-picking. If we were dealing here with rascals, your Honor, there would have been some intimation in the language on page 9 that General Host, when it has its 51 per cent, which is the cut-off on the proposal, when it gets it will control Armour and will cause Armour to do certain things.

But we read this and this is the language of decent, honest men working, by the way, under the eyes of decent, honest policemen trying to do things right. There isn't any "when" here. There isn't any intimation that this is really going to happen.

What it says is:

"General Host intends to act promptly both before and after consummation of the exchange offer to

obtain control."

No suggestion that control is an automatic consequence of the ownership of 51 per cent. This is something they have to do. They have to move. In this connection they say this is what we are going to do. Number one, we are going to solicit some proxies. Number two, other things, and we will come to that. For example, they say "General Host may find it desirable upon consummation of the exchange offer to propose," and the rest of the paragraph, and then the dead give-away that this is a perfectly honest attempt at an honest exposition of something that human beings understand:

"If no such merger or consolidation occurs," and then they go on to describe what will happen.

Is that the language of people who are trying to represent to the stockholder that it is an automatic consequence of the acquisition of 51 per cent that they will control the corporation? Of course it is not. It represents an honest effort on the part of the draftsman to say: If we get 51 per cent, this is what we intend to do, and if we can't do this, this is what we intend to do.

I suggest to the Court that in order to go along with the Weiss interpretation of this language, and

of course I hate to take with it what appears in the annex, and I will come to that in a moment, in order to do that, in order to apply the label of recklessness to these people you've got to understand that they were trying to deceive somebody, they were trying to represent it in a way that suggested that the inevitable automatic sequelal of the ownership of 51 per cent was controlled and they did exactly the opposite.

Now, what do we get down to? This is what we call, as your Honor knows, an emphasis case where the point is did we say it strong enough and did we say it in the right place. Well, I think it was said and I think it was adequately said.

Of course, like every other human effort, there might have been a better way to do it or a clearer way to do it, but this becomes of such critical importance, not on the day when it is written, but it becomes of critical importance only when Mr. Weiss, having started a case on a completely different theory which evaporates out the window, finds that this is one of the surviving nits he can pick. That is when it begins to take on this critical importance.

Could it have been done better? Yes, your Honor. I am sure that there could have been something

written on the front page of this cover, as we write certain things on the front page of every cover in black type saying: By the way, we are not sure of getting control. By the way, if we don't control, this is what is going to happen. By the way, if we do get control--how much can you put in black type on the cover, and is black type enough? How about neon lights?

Where do you stop within the bounds of mechanical possibility? And all of it is done under the careful supervision of the Securities and Exchange Commission. All of it done in consultation with them.

Well, emphasis. Mr. Weiss necessarily has to complain that when we went to describe the staggered board we put it in the back of the book. Now, your Honor and I and some of the other people in this room have been hearing about the back of the book for a long time in these cases. I suggest to your Honor that what they did was the normal standard treatment where you have a prospectus which attempts to describe the one company, the dominant company and which attempts to describe the target company.

From time immemorial we have had a second section where we have described the target company. That is what we did here. Nobody back in 1969 had to have the prescience to believe that the description of the staggered

board would become so important at some time that it should have been up in the front of the book and maybe in neon lights on the cover. Why not? Because any reasonable human being approaching the problem of adequate exposition of this problem to the stockholders of Armour knew the stockholders of Armour have had proxy statements.

The stockholders of Armour have been bombarded with literature. The stockholders of Armour are up to here with the question of the staggered board, and it only becomes important, critical, fatal in an attack like this five years after the event.

You had to be a fool back in 1969 to think that that point was going to be the point on which millions of dollars might depend and on which the reputation of professionals would depend. You had to be crazy. If anybody had said that to us then we'd have laughed in his face. We would have said, "Oh, my goodness, they have got information about the staggered board," and I'm sure I'm not improvising that when I suggest that that was the kind of reaction that they got from the Securities and Exchange Commission.

B3 But the thing that impresses me most is that in this tremendous attack that was launched against this proxy statement by Sullivan & Cromwell before this Court

in 1969 nobody even paid any attention to it, because it was contemptible.

On the cash flow thing, the cash flow thing is equally contemptible because there was no other way to present it. There was nothing else you could do with it. It was presented precisely the way the accountants, the lawyers, the Securities and Exchange Commission and, with all respect, this Court on its initial exposure to it, and I know the limitations on that--I am not trying to take undue advantage of what happens on a motion for a preliminary injunction.

I know there is a big difference, but still a lot of respectable people came to the conclusion that this was a respectable way of setting it forth.

Now, your Honor, I don't want to take a lot of time to rehash what has been said. This is a recklessness case. In order for this case to survive a motion to dismiss there must be a demonstration on the part of the plaintiff here that these defendants have been reckless, that they have driven through Foley Square at 80 miles an hour.

I have an analogy and it has been in my mind from the moment I began to understand this case. This is a situation of a perfectly honest citizen who wants to

park his car at a safe place without running the risk of it being towed away, so he looks around the street and he finds a safe place, but he is so fair, so careful, so honest and so prudent that because he does not see the sign that says, "No Parking" he doesn't want to take the risk.

There is a policeman on the beat, so he goes to the cop on the beat and he says, "Is it all right to park my car here?" And the cop says, "Yes" to this citizen, "It is a proper, safe place to park your car." But this citizen goes farther. The captain of the precinct is driving by and he says, "Captain, excuse me. Your officer just told me that this is a safe place to park my car."

The captain says, "Yes, Mr. Citizen, this is a safe place. My officer is right."

Fine. You park your car and you come back and there is Mr. Weiss who wants to make a citizen's arrest because you have been reckless in parking your car in that place.

That is what this case is about. It is absurd to suggest that these people were reckless. It is absurd to suggest that they were anything other than decent, professionals trying to do a decent, professional job.

mcjp

There isn't a shadow of a bit of evidence here. What there is is an application to this Court to hold that as a matter of law, without respect to anything that came off that witness stand, the staggered board should be presented with more emphasis than the cash flow should have been presented in a way that somebody figured out five years later might have conveyed more information.

You have to stoltify yourself to think that any stockholder in exercising his option was affected by either of those things or could have been affected by either of them, not that it matters as a matter of law, not that it matters, but we are reasonable men trying to approach this from a reasonable point of view and to suggest that on the application of those two items, on an application to this Court to say it could have been done better--really not better, different, not better, and therefore condemn these people, penalize these people and make them pay a lot of money, I suggest to the Court this case doesn't belong here and should be dismissed at this point.

MR. DUFF: Your Honor, on behalf of counsel for Allen & Company I certainly join and associate myself with the remarks of both Mr. McAmis and Mr. Gould and I will just be a moment to ask your indulgence with respect to Allen & Company itself, because in this case

I think it is peculiarly appropriate to consider whether or not Allen & Company should ever have been a defendant in this action.

The stipulated facts I think quite clearly set forth the relationship between Allen & Company and Allen & Company, Incorporated. There certainly is an overlap of those relationships and that overlap is set forth in the stipulated facts.

However, I would like to bring to your Honor's attention, which I am sure you will have recognized, that it was Allen & Company, Incorporated that was the dealer-manager in the situation. Previously Allen & Company, Incorporated had been the underwriter in two issues of securities on behalf of General Host Corporation and in one issue of securities on behalf of a subsidiary. It had placed the private placement of $47,400,000 of the convertible notes in the fall of 1968 and the prospectus names Allen & Company, Incorporated in at least three places, actually the only places there is any mention of Allen in the prospectus as the dealer-manager in connection with this exchange offer.

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It is clear that Allen & Company, Inc. has during all relevant periods had the responsibilities of being an underwriter in this case, and it is the customary relationship of the two parties that it is the dealer-manager in this particular issue. It also has other responsibilities that were the responsibilities of Allen & Company in connection with mergers, but as the dealer-manager, Allen & Company, Inc. was the responsible party in this particular situation, and your Honor has before you the relationships between Allen & Company and Allen & Company, Inc.

I submit to your Honor that on the facts of this case and based upon the evidence that has been presented, that the case should be dismissed as against our client, Allen & Company.

MR. BROWN: If your Honor please, on behalf of the defendant Richard Pistell I would like to join in the substance of the applications and motions that have been made by co-counsel and request your Honor to dismiss the action as to Mr. Pistell.

THE COURT: Any other defendant wishing to be heard?

I will hear the plaintiff.

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MR. WEISS: What was that, your Honor?

THE COURT: I said, I will hear the plaintiff.

MR. WEISS: I don't think my colleagues want to sit next to me too long, because apparently I am contemptible, so I think I will remove myself from that position and give them some comfort. I only counted seven times.

Your Honor, it seems to me that the main thrust of what the defendants are saying is not that they did it right, not that what they did wasn't misleading, not that what they did wasn't reckless, but that somebody else did something that might be cured. That is the essence of their argument, because I don't think anybody who can fairly -- who fairly reads the language on page 9 can come to any other conclusion but that it was in there, intended to give the Armour shareholder the belief that General Host could do various things to satisfy its business requriements, its cash requirements, its debt requirements, and among those things it is stated:

"We can cause Armour to sell certain assets, we can increase Armour's dividend, we can merge, we can consolidate and do all these things," and the Armour

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shareholder who was going to take General Host's securities in exchange -- I mean, this is what he was being asked to do -- was being given a feeling of comfort, that "Even if these attacks made against General Host that it cannot service its debt out of internal cash flow are true, these are the other things that we can do."

Now, first of all, they point to a couple of articles,or an article in the letter of January 9th. I want to make the point that there wasn't even an offer on the table at that time to the Armour shareholders. All there was was an S-1 filing with the SEC that didn't become effective until January 30th.

Secondly, whenever I inquired of defendants or witnesses in the depositions in this case as to what they thought this, that or the other thing meant, the defendants jumped up and said, "You can't ask that. That is asking for a legal conclusion and this man is a lay person."

Now they want to urge this court to accept a concept that when the Armour shareholders, who are lay people, received two countercontentions, that they should come to a legal conclusion as to which of the two contentions is true.

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The fact is that Armour was right, and the fact is that General Host put it in a different way, and the individual out there had to make a decision, who was right and who was wrong.

Now, if General Host had said, "We agree wth Armour; these are the facts; we can't increase Armour's dividend until we get control or until we can convince the existing board of Armour, which is antagonistic to us to do such; we can't sell off the assets of Armour and use it for our own cash requirements until we get that kind of control. Now we ask you to make an investment decision as to whether or not you want to take the risk that we can accomplish those results.

They didn't say it that way. As a matter of fact, when they say that Armour made certain contentions in court, we deny them.

Well, what does that tell your Honor? That they are denying the Armour contentions, that Armour is wrong, that staggered board of directors and cumulative voting requirements won't interfere with us. We can get control at the next meeting.

THE COURT: Where do they say that?

MR. WEISS: Your Honor, by saying that through the solicitations of proxies on page 9:

"General Host intends to act promptly both before and after consummation of the exchange offer to obtain control of the board of directors and management of Armour. In this connection, it may engage in the solicitation of proxies for the election of directors of Armour and other matters at the February 21, 1969 annual meeting of Armour & Company and otherwise."

I say that leads to the impression that through the solicitation of proxies they can get that kind of control on February 21st and they couldn't because there are only six directors out of 17 up for election at this meeting.

We asked one of the witnesses, Mr. Glynn, what "otherwise" meant to him, and he said "Nothing."

Mr. Glynn testified --

THE COURT: Is that statement incorrect in any respect on its face?

MR. WEISS: Yes, because they couldn't obtain control on February 21st through the solicitation of proxies. There were only six directors up for election on February 21, 1969. That is only seven days after the exchange offer is completed.

How can they get control with six out of seventeen directors?

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THE COURT: Well, isn't that the initial move to obtain control?

MR. WEISS: Your Honor, there's everything in here about acting promptly before and after consummation of the merger to obtain control.

THE COURT: Well, couldn't that be acting promptly?

MR. WEISS: The whole implication of this section of the language on the top, where they say that the federal court rejected this theory and held that "This decree does not forbid acquisition by General Host of a controlling interest in Armour" -- contolling interest in Armour: how can they dispose of assets of Armour without operating control of the board of directors as set forth in paragraph 4 under that section?

Your Honor, it is clear and I think it is undisputed that there was a big issue about General Host's ability to pay debt and to service debt after this exchange offer was completed. This was a concern of everybody. It was a concern that was brought to your attention to the Armour and Kelley litigation. It must have been of concern to the Armour shareholders. The Armour shareholders were not asked to take cash for their stock. They were being asked to take

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General Host securities. What General Host could do as a corporation in the future was very important to these people, and what these people were being told in face of these attacks that General Host's cash might not be sufficient is, "We can do a lot of things to satisfy those requirements, some of which are merger, consolidation" -- which, incidentally, required two-thirds of the shareholders in those days, plus a majority of the board of directors -- "we can increase the dividends so that the stock in Armour will pay more dividends. We can sell the assets of Armour."

Now, what good is selling the assets of Armour in the context of this provision if they can't get to the proceeds of those sales?

THE COURT: What significance, if any, is to be attached to the information that was submitted to the Armour stockholders by the Armour management with tespect to the difficulties that would be -- that Host would be confronted with under the staggered board of directors setup as well as the cumulative voting?

MR. WEISS: First, as I pointed out, your Honor, this was sent out several weeks before an offer was on the table, so to speak.

THE COURT: I understood there was a subse-

quent offer.

MR. WEISS: On January 17th. This offer became effective January 30th. Now, you can't assume that an Armour shareholder who hasn't read the previous one is going to bother over this.

THE COURT: Well, you have to assume that people are going to pay attention to a notice.

MR. WEISS: No, no --

THE COURT: Realistically, this was a rather bitter struggle for control or to ward off the attempt to take over Armour, as I recall it. You say these letters would have made no impression?

MR. WEISS: Yes, your Honor, I think they made a heck of an impression. I think they made these people acutely aware --

THE COURT: I think we are getting off. My question was, what significance, assuming this information came to the attention of the stockholders, is to be attached to the fact that Armour sent the notice as distinguished from General Host?

MR. WEISS: No. 1, it's that contentious environment so people tend to be skeptical of a target company's assertions about the offering company.

No. 2, they are lay people. They can't

be asked to come to legal conclusions about representations.

THE COURT: That isn't a legal conclusion. That's a statement of fact, the method by which you elected directors and also the requirements for cumulative voting.

MR. WEISS: And it also has an impact on General Host's ability to do certain things.

Now, a lay person can come to the conclusion that if General Host tells me on January 30th and thereafter that I can increase the Armour dividend if I get 51 per cent, then I could do it. General Host can do it. That's what they are representing.

THE COURT: Where do you see that representation? I would permit you to draw an inference, but is there such a representation?

MR. WEISS: Yes, "may find it necessary or desirable" --

THE COURT: You said the representation was that "If we have 51 per cent of the stock, we can do that."

Where is there any such representation?

MR. WEISS: I will explain that. This exchange offer, your Honor, wouldn't close unless they

got over 50 per cent.

THE COURT: I understand that, but where is the representation that "If we get 51 per cent" -- using your language -- "per cent of the stock that we can put these things into effect"?

MR. WEISS: I will modify it. If they can get any percentage over 50 per cent. That's the representation.

THE COURT: Where is it? I am asking you --

MR. WEISS: Because this all assumes that the exchange offer is successful.

THE COURT: You see, you don't answer my questions. I am asking you, is there a specific representation as to that?

MR. WEISS: I'm not sure I understand your Honor's point.

THE COURT: Well, I can't put it any more plainly. I will have to desist.

(Record read.)

MR. WEISS: This prospectus represents the following: No. 1, General Host is trying to get 51 per cent of Armour. If it doesn't, it doesn't accept the stock tender.

THE COURT: I understand your question. What you are doing now is arguing the inferences or the impact. I thought my question was a very specific one and I thought it put it in very plain language -- maybe I haven't -- I asked you to point to the prospectus where they say that if they have 51 per cent of Armour stock they can put this into effect.

MR. WEISS: "To propose to stockholders a merger of present or future subsidiaries of Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of certain assets held by it or by Armour. If no such consolidation occurs and General Host hasn't acquired more than 80 per cent of the common stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid on the common stock by Armour or to incur new indebtedness or issue new equity securities upon consummation of the exchange offer."

THE COURT: Which, of course, omits the prior paragraph, that "General Host intends to act promptly."

MR. WEISS: Both before and after consummation of the exchange offer.

THE COURT: To obtain control of the board of directors of Armour.

MR. WEISS: Right.

THE COURT: Doesn't that suggest that they do not immediately have con' ol, that they are first going to undertake it.

MR. WEISS: "In this connection it may engage in the solicitation of proxies for the representation of Armour at the February 21, 1969 meeting or otherwise."

THE COURT: Well, what you are saying in effect is, that in this paragraph, in words or in substance, there should have been a statement, that the mere fact that we have 51 per cent of the stock doesn'. mean that we have effective control.

MR. WEISS: Exactly.

THE COURT: That in order to do this, we must get control of the board of directors, and because of the method of electing directors, first under staggered terms and also because of cumulative voting, this may take a perion of several years and we may have difficulty.

That's what you say should have been included in words or in substance.

MR. WEISS: That's exactly right.

THE COURT: And that's the omission you claim.

MR. WEISS: That's right.

THE COURT: It took me a long time to get you to say that.

MR. WEISS: I am sorry.

THE COURT: There is no express misrepresentation.

MR. WEISS: I allege it as an omission case. That's right, your Honor. And I also say the same thing about the pro formas that follow. It is not what's in there. It is --

THE COURT: I don't mean to interrupt you, but have you finished your argument with respect to this aspect of your contention?

MR. WEISS: Yes.

THE COURT: Now, would you be equally specific insofar as your pro forma claim is concerned: what do you think should have been included that was not included? State it as specifically as you can.

MR. WEISS: I say that at the beginning of the pro forma treatment which starts at page 10 and continues through page 17, I believe -- through page 20,

that there should have been an initial paragraph, "We are presenting the following combined figures of General Host and Armour on a pro forma basis. However, you should be aware that we may not have the ability to consolidate, to merge these two companies, and this presentation is merely for accounting reporting purposes. It shall not be assumed that we will have the ability to use Armour assets until such time as the Armour board of directors shall approve, or the shareholders of Armour shall approve, and that might take X number of years until we can influence that decision."

THE COURT: Well, not X number of years. What would the limit be?

MR. WEISS: I would say "See the provisions contained on page 9," which would be the language that your Honor suggested should have been included there.

THE COURT: Oh, I didn't say it should have been included there.

MR. WEISS: Might have been included.

THE COURT: If I said "should have been included," I could direct a verdict for the plaintiff immediately and we could all go home.

MR. WEISS: I would like to urge that your Honor would do that.

THE COURT: Well, I am sure you don't mean that.

MR. WEISS: With respect to the cash flow argument, your Honor --

THE COURT: Before you leave what you just said you thought should have been included, is there any material from page 10 through 14 -- and 10 is where you refer to beginning with the subheading, "Pro forma effect of exchange on General Host per-share earnings" --

MR. WEISS: Yes.

THE COURT: -- that you claim is misstated or misrepresented in any way, and are you directing your contention to any other matter contained therein other than the omission to include in words or substance what you just referred to?

MR. WEISS: I think that the presentation of the pro forma effect of exchange on General Host stock as to book value is misleading. It gives effect to the conversion of the $47.4 million of debt as if it was converted to equity. In other words, the money that was borrowed by General Host in October, 1968,

the one that the Allens acted as agents to obtain, was a convertible, and they hadn't been converted.

So in footnote 1 they said:

"Represents book value at October 5, 1968 adjusted to give reserve effect to the conversion of the 5 per cent convertible subordinated notes and issue of General Host's 7 per cent subordinated debentures and warrants."

Now, I think that they should have given two columns and set forth that if not converted, the book value would be X, and if converted, the book value would be Y. This inflates the book value.

Secondly, by virtue of this acquisition, good will is established, because in effect, General Host is paying more than the book for the assets of Armour than the assets of Armour book value, and under "purchase accounting," which is the accounting treatment afforded this transaction, I think they say something like $93 million of good will is created.

Now, on a pro forma basis, the book value of a combined presentation is if the tangible net worth of that book value is $26 or $27, a presentation such as that to me is misleading. It should state that if this combined or consolidated treatment is afforded

these two companies -- I think I have the number in our proposed findings, because they can be calculated -- a substantial portion of the book value will represent intangible assets -- good will.

On page 13 -- frankly, I make the argument, your Honor, that the presentation of the $9.4 million of debt that was due in August, 1969 under long-term debt is a materially false and misleading way of presenting it, and I don't think we are bound by any accounting principles in a court judging whether or not there's a fair presentation.

As far as I am concerned, that's short-term debt. It was debt that the lender had already expressed it wouldn't renew, they would have to go to third parties to pay it off or pay it off out of internal funds, and it should have been reflected as a short-term obligation, so that the reader would know what the cash obligations of the company would be in the ensuing year or until such time as General Host could make use of Armour's assets to pay off those indebtednesses.

THE COURT: But is this entry in accordance with generally accepted accounting principles?

MR. WEISS: I will concede that there is

an ARS --

THE COURT: Is that 51, or is that another one?

MR. WEISS: It's another one, your Honor.

THE COURT: But you are saying that notwithstanding --

MR. WEISS: It's an ARS 7.

THE COURT: But you are saying it shouldn't have been set up as long-term debt?

MR. WEISS: Yes, your Honor. Under the circumstances I don't think we should be bound by that treatment.

THE COURT: What else do you disagree with --

(Pause.)

THE COURT: Mr. Weiss?

MR. WEISS: Yes, your Honor, I am just going through this.

That's all I have on that portion, your Honor.

THE COURT: All right, gentlemen. Have you all stated your arguments?

MR. WEISS: There's just one more point, your Honor.

THE COURT: All right. Go ahead.

MR. WEISS: I also contend that the cash flow projections, even if not permitted to be included in the amounts of the projections, should have been stated as the basis upon which the company believed it could service its indebtedness in the future. I think a clear statement should have been made in the prospectus --

THE COURT: What is that?

MR. WEISS: That based upon historical earnings, General Host's earnings will not provide sufficient coverage to pay its debt as of in the future and that the company is relying upon its projected earnings to so do and the investor has the ability to decide whether he wants to take the risk that General Host's earnings will go up in the future, and he will know very clearly that if it only earns what it's been earning on a historical basis, that it will have that problem.

Now, I would also like to point out a couple of other things. I am sorry, but the importance to me --

THE COURT: Well, I will give you an opportunity to answer the argument. Go ahead. You don't

have to apologize. Take your time.

MR. WEISS: On January 31, 1969, Greyhound came out with a competing tender offer. They announced on January 27th and they sent out a January 28th tender and then they amended on January 31st.

Now, in the January 31st letter of tender they set forth the amount of stock that they own, that they already have acquired, and you can compute from the amounts that are set forth in this letter as comparing it to the outstanding stock of Armour as set forth in the prospectus the fact that that number of shares, which is approximately 1.2 million shares, represented more than 20 per cent of the then outstanding 6.1 million shares of Armour.

Now, the General Host prospectus has only two slight references to the Greyhound competing offer. It states that a competing tender is being made by Greyhound, which seeks 41 per cent -- up to 41 per cent of Armour's stock. I just can't put my finger on it.

MR. MC AMIS: Page 12.

THE COURT: Have you become associated with the plaintiff now, Mr. McAmis?

MR. MC AMIS: I am sorry, your Honor. I thought I would move it along a little.

THE COURT: What is the point?

MR. WEISS: I am going to get into it.

THE COURT: All right.

MR. WEISS: Now, in this pro forma treatment that they have in the General Host prospectus they talk about levels of 60, 80 and 100 per cent ownership. They also talk about the ability to effect certain tax savings at an 80 per cent ownership.

Now, I think that as soon as General Host and Allen became aware that Greyhound had acquired 20 per cent, they should have stickered this prospectus and alerted the Armour shareholder that the ability to obtain 80 per cent --

THE COURT: Let him finish.

MR. GOULD: I will let him finish, your Honor, but --

THE COURT: No, go ahead with your argument.

MR. WEISS: -- that the ability to obtain 80 per cent was inhibited by this factor and also that the representation that certain tax savings could be afforded in the event of an 80 per cent acquisition was no longer seemingly viable.

Now, your Honor, the other point, of course --

and it really isn't the omission argument -- is that there should have been a warning that the ability to get control due to the staggered board and cumulative voting provisions, in view of the Grayhound competing offer, might be impeded, and that's something else that they should have put in that area, and also that the ability to merge.

If Greyhound got 1/3 ownership of the Armour stock, under then existing Delaware law they couldn't merge even if they got the board to go along with them.

Now, your Honor, I would like to discuss the law.

THE COURT: The what?

MR. WEISS: The law.

The first thing I would like to do is dispel any illusions that a conscious state of mind is required to hold a defendant in a case like this liable.

On page 369 of the Chris-Craft decision, when discussing Bangor Punta liabilities, the court says:

Nor does the evidence show that BPC fails to disclose the negotiations in good faith. As we have indicated above, however, intent to defraud is not

an indispensable element in an action for damages under the provisions of the federal securities laws. The securities laws impose upon an exchange offerer a duty to act reasonably in discovering facts material to the offer at the time of the transaction and in disclosing those material facts of which the proposed offeree is unaware and which would ostensibly influence his judgment."

Now, what the court seems to do -- and I have analyzed the decision -- is that up until the language that I quote in my brief, the one that your Honor alluded to on Monday, they analyzed the history of various other sections of the law. They analyzed "Section 11, Section 10b, and then they come up with a standard 14(e) and that standard is the one that we quoted in our brief. It doesn't have the reckless requirement.

Now, Judge Gurfein, in his concurring opinion, states:

"I lean to a reckless standard, that is, closer to a deliberate intent standard."

Judge Mansfield goes the other way. He says:

"I don't think these words are useful.

They just confuse. We have to get to the essence of what we are trying to accomplish here."

They all agree that something more than mere negligence is required and I agree that that's the present law in this circuit, something more than mere negligence.

THE COURT: Well, that is, as you understand the law.

MR. WEISS: I am trying to meld it all together, and this is the standard that I see. We try to establish what the undertaking of the defendant is, what he was supposed to do and how well he did it. Was he definite in the performance of his duties and was the public relying upon him to perform it. Then we have to look to see if a person performing that function at the level of expertise that such an individual should have would have in the exercise of reasonable care discovered the misstatement or omission or perfsormed in another way than he had performed; and when you read all of these cases, I think that's what it comes down to. We have to look at the individual, we have to see what his duties were, what was he charged to do, what kind of reliance was the public placing upon his proper performance of those duties, and

whether he performed those duties in a reasonably competent way, and if he didn't, he was reckless.

Now, this case goes beyond that, because we have testimony from each one of the defendants that they knew what the problems were. In the Armour study, which was prepared in October, they highlight this in the section on legal implications, they highlight it. They use it to their advantage in Illinois, stating it clearly. They have no problem in stating clearly what their problem was. They found very artful ways of doing it in Illinois. Mr. Allen knew about it. What was his approach to the problem? Very cavalier, your Honor. "I had another experience recently where this became no problem because the directors of the target company succumbed and resigned."

Did he look into what would happen if they didn't resign, what the consequences might be to the company, oreven that he should state in the prospectus that that's what he is relying on. Why didn't he put in the prospectus, "We are relying upon the consent of the directors to resign"?

There was testimony --

THE COURT: Now you are going back into

facts now. You were going over the law. Let's stick to the law, otherwise we will be starting all over again.

MR. WEISS: You are right, your Honor.

THE COURT: While you are on that subject I will bring you back to that. What significance, if any, is to be attached to the judgment of men who believe that whereyou do acquire 51 per cent of stock control, that this is sufficient, however, to in due course obtain effective working control, if directors who may be hostile originally may see the handwriting on the wall and say, "We see no purpose in this dissident group as far as our obligations to the shareholders are concerned"?

MR. WEISS: All right. The anti-fraud provisions of the securities laws merely require disclosure. If this is what happened and this is what they were relying upon to get control, then state what they believed might happen as a business judgment did not happen.

Then we are confronted with the following picture. We eigher might have to start a lawsuit to get them out of there, they might have to urge that a shareholders' resolution be adopted to such-and-such,

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or else we have to wait. We can only elect them seriatim over the next three years.

But state it. Tell the Armour stockholder what the situation is. Let him make an informed business judgment.

How can we read what's in Herb Allen's mind when he doesn't tell us?

He is really asking us to rely on his business judgment which he is not telling us. He is saying, "Trust me."

THE COURT: All right. What else do you have on the law?

MR. WEISS: I just bring this court's attention to the sections of the Christ-Craft decision which discuss the duties and obligations of the underwriter-dealer-manager, and I made the point before --

THE COURT: You did before. You answered that before, didn't you?

MR. WEISS: I am not talking about the point of the similarity between those two designations, but there is a complete discussion of what duties a dealer-manager-underwriter has, and the reasons for its being held liable, and that's at page 370, and on 371 the court uses an objective test in determining whether or

not the underwriter-dealer-manager performed its duties. "Moreover, if it was aware of facts that strongly suggested, even though they did not conclusively show, that the registration materials were deceptive, it was duty bound to make a reasonable further investigation."

Here we claim they knew, because they read it themselves, and I want to also point out, your Honor, that four times in the Christ-Craft decision the court uses the words "accurate and correct" or ""incorrect or inaccurate" in describing what they are being charged with. Inaccuracies in the registration statement, lack of correctness in the registration statement, and, of course, the court also accepts the constructive reliance test, especially in public offering situations, and that's at page 374.

They held First Boston liable because "We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate."

That is at page 373.

Now, in discussing that --

THE COURT: There's no point in that. What are you going over that case for? You have got it in your brief. I am familiar with it. I

don't know why you are spending time on it. I asked you a specific question, what your burden of proof was as far as liability is concerned, and you started at one point, and I ask you to state again, what do you have to prove, just in one sentence or two sentences.

MR. WEISS: That these defendants, with a reasonable exercise of care in the performance of their duties, could have and should have become aware of the material misstatements and inaccuracies that we complain of.

THE COURT: Now, you sought to interrupt Mr. Weiss before, Mr. Gould.

MR. GOULD: I apologize for that, but I don't want to reply.

THE COURT: I don't want your reply.

MR. GOULD: No, no, just the point that stimulated me there.

THE COURT: That's all I will allow you to do.

MR. GOULD: This business that we should have changed this after we knew about the Greyhound offer is a completely new claim in this case. No proof has been offered, no suggestion is made in any of the papers about it, and of course there are the

two references to it, the reference at page 12 and the reference at pages A-8, which I am sure your Honor will recognize as the amendments required by the Securities and Exchange Commission.

THE COURT: The position is that once the Greyhound offer was known then they should have stated that they couldn't get 80 per cent of the ownership.

Now, one further question, Mr. Weiss: What is the theory on which you can speak to hold Allen & Company?

MR. WEISS: Two points. Aiders and abettors and controlling persons. If you read the February 4, 1969 letter you will see that it was apparently --

MR. SOLOVAY: That is Allen & Company.

MR. GOULD: That's not in evidence.

MR. WEISS: This letter is not in evidence? I was certain I had put it in. What number? Plaintiff's 60. It's in evidence.

THE COURT: Is that the document as to which there was discussion as to whether it was on a letterhead?

MR. WEISS: No, this is a letter dated February 4, 1969, I think I put it in when Mr. Bettauer was on the stand.

"It is the opinion of Allen & Company that in the event General Host Corporation in its proposed tender offer received sufficient shares of Armour & Company -- that on or before August 28, 1969 Allen & Company will be able to refinance the 9.4 million of 5-1/2 per cent notes presently held by a group of institutional investors. This letter is not a firm commitment. Any financing would be subject to market conditions at that time."

THE COURT: Now, what is that supposed to prove as far as liability is concerned?

MR. WEISS: That they were involved in this. Why should Allen & Company issue that letter if not Allen, Inc.? Herbert Allen signed it for Allen & Company. He was also president of Allen, Inc.

THE COURT: All right.

The court reserves decision on the respective motions.

All right. The defense may go forward.

MR. MC AMIS: I call Mr. Ashton, your Honor.

THE COURT: I will sit until 12:30, and because I have some other matter we will take a longer luncheon than usual. We will resume at 2:15

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H A R R I S J. A S H T O N, called as a witness in behalf of the defendants, after having been duly sworn, testified as follows:

XXX

XXX

DIRECT EXAMINATION

BY MR. McAMIS:

Q Mr. Ashton, what is your employment?

A I am the president, chairman of the board and chief executive officer of General Host Corporation.

Q How long have you been so employed?

A I have been president of General Host Corporation since December 6, 1967. I became the chairman on or about June 1, 1970, and then, approximately June of this past year, resumed the title of president again.

Q Are you an attorney?

A Yes, I am.

Q A member of the Bar?

A Yes, I am.

Q And would you please state for the Court what you did from law school until the time you went to General Host as its president, as you have testified?

A I graduated from law school in 1959. In August of 1959 I went to work for the firm of Breed, Abbott & Morgan as an associate. I stayed there until October of 1962. In October of 1962 I became associated

with the law firm of Lovejoy, Wasson, Lungren & Huppick.

Subsequently I became a partner of that firm, the name of which has been changed to Lovejoy, Wasson, Lungren & Ashton.

On December 6, 1967, I became president of General Host Corporation and effectively stopped the active practice of law at that time.

Q Have you practiced law since that time actively?

A No, I have not.

Q Are you still a member of Lovejoy, Wasson, Lungren & Ashton?

A Yes, I am.

Q Do you participate in fees paid by General Host to that firm?

A No, I do not.

Q Has that been true since you became president of General Host?

A That is correct.

Q Mr. Ashton, did there come a time when General Host decided to make an exchange offer for common shares of convertible debentures of Armour & Company?

A Yes.

Q When was that?

A December 16, 1968.

Q What happened on that date?

A That was the date the board of directors of the corporation authorized the filing of a proxy statement, preliminary proxy material in connection with an annual meeting or a special meeting of the shareholders of the General Host Corporation to be held on January 20, 1969 and at that meeting the action was to be taken by the shareholders to approve the making of an exchange offer as well as amending the certificate of incorporation to increase the outstanding common from 10 million shares to 30 million shares.

Also at that meeting the board of directors specifically authorized the filing of a form S-1 with the SEC in such form as counsel approved.

Q Before we go into the filings, Mr. Ashton, what was General Host's position in Armour at that time?

A General Host Corporation owned 16.5 per cent of the outstanding common stock of Armour & Company.

Q Did that make it the largest shareholder of Armour?

A That is correct.

Q For what reasons did General Host decide to make this exchange offer at that time?

A General Host Corporation felt it was the best

way to maximize on the 16.5 investment in Armour.

Q Can you explain that?

A Yes. At that point in time General Host Corporation had the 16.5 per cent position and Armour & Company had announced on December 12, 1968 the proposed acquisition of Williams Brothers by issuing one-third shares of Armour's shares for each of the 2.9 million shares of Williams Brothers that was outstanding which would have meant an effective dilution of approximately 62 per cent for the Armour shareholders.

Q This was a merger for stock; is that your testimony?

A No, it was going to be an exchange of stock.

Q But Armour was proposing to issue additional stock?

A That is correct. It would have amounted to approximately, I think, 3.8 million shares.

Q And you said that Host at the time had one-sixth and a half per cent. Have you made any calculations as to what Host's percentage would have been at that time if action had been consummated?

A I think Host's percentage would have been reduced to 9 or 10 per cent.

Q Have you finished your answer to what factors

were involved in deciding to make that exchange offer at that time?

A At that particular time on December 16th, yes.

Q In connection, then, with the offer were certain documents prepared and filed with the Securities and Exchange Commission?

A Yes. On December 16th we filed preliminary proxy material which the SEC cleared on December 27th of 1968.

Q What was that for?

A That was for the special meeting of shareholders of General Host Corporation to approve the exchange offer.

We also filed on December 30th a form S-1 for making the exchange offer. There were subsequent amendments to that, but the SEC declared it effective on January 30, 1969.

Q Did you say the initial filing was December 30, 1968?

A That is correct.

Q In connection with aspects of its exchange offer, did General Host consult outside experts?

A Yes, General Host Corporation consulted its counsel, Lovejoy, Wasson, Lungren & Ashton. It hired the

firm of Skadden, Arps, Mr. Joe Flam. It consulted Allen & Company and Kleiner, Bell. It retained counsel in the State of Illinois, Jenner & Block. It retained the former head of the Antitrust Division of the Justice Department, Herb Berkson. It retained Kissel-Blake and D.F. King to assist in the solicitation of proxies. It retained Laird & Company to make an appraisal of the value of its assets. It retained the firm of Connelly, Bove & Lodge in Delaware to advise it on the Delaware statute, and it also consulted its banks in connection with making the offer.

Q You mentioned Allen and Kleiner, Bell. Did you have reference to them or to others?

A Allen and Kleiner, Bell we consulted and after, of course, their attorneys, Holtzmann, Wise & Shepard and Goldfeld, Charak participated in the work in connection with the exchange offer.

Q I'm trying to find out what you meant by banks.

A The Union Bank was our lead bank, but we had, in addition, borrowed or had a commitment to borrow $20 million from the Franklin National and the Bank of Commonwealth as well.

Q What was the purpose of retaining Laird to appraise General Host's assets?

A The purpose was for two reasons, to determine

whether in the event that General Host had to sell its position in Armour & Company because of the Justice Department action that it would make sense for General Host to propose this transaction, and also to see what our assets could be sold for in the event that we had to sell all of the assets to take control of Armour.

B2 Q That was an alternative or possibility, you mean, depending on how the Justice Department suit came out?

A That is correct.

Q Who at Host was in charge of preparation of these documents which I believe you have described as the proxy statement for the special Host shareholders' meeting and the registration statement which included the prospectus that has come into evidence as Plaintiff's Exhibit 23 in this action?

A Of course, the overall responsibility would have been the chief executive officer, Dick Pistell, but I as the chief operating officer had working responsibility for the preparement of these documents. Under me the actual preparation in the drafting of the document was done by our counsel, William F. Downey, who was general counsel to the company.

In addition, Price, Waterhouse was retained.

Q Where is Mr. Downey located?

A He is a partner in the firm of Lovejoy, Wasson. In addition, Price, Waterhouse was retained to review the financial statements that would be included in these documents and particularly in General Host Jack Glynn and Tim Day worked in conjunction with the actual preparation of it.

Q What was Mr. Glynn's connection?

A Mr. Glynn was the comptroller of General Host Corporation. He was a former associate in the Price, Waterhouse firm.

Q Was he in charge of preparation of financial statements?

A Yes.

Q And how about Mr. Day?

A Mr. Day was vice president of acquisitions. He participated in the overall drafting of the documents.

Q Did Armour have any reaction to Host's proposed exchange offer?

MR. WEISS: I object, your Honor. First of all, it is leading. Second of all, there is no time frame. I don't know what proposal they are talking about.

THE COURT: Fix a time.

Q When was this exchange offer announced?

A The actual exchange offer would have been announced--that we were making such an exchange offer on December 13th. The actual exchange offer itself would have been probably on December 30th, when we filed the--

Q By the actual exchange offer, do you mean the terms of the offer, the proposed offer?

A I think actually on December 23rd we announced the terms of the offer, but the actual document that for the first time set forth everything was filed with the SEC on December 30th.

Q That was the preliminary prospectus on the form S-1; is that correct?

A It is form S-1, part of which is the preliminary prospectus.

Q I should ask if you had any speciality when you practiced law.

A Yes, I was involved in the corporate end of the practice.

Q Including securities transactions?

A Yes, I was.

MR. McAMIS: Your Honor, at this point I think it would be convenient to put in some documents that we will be having reference to in our direct case, some of which I may ask Mr. Ashton to explain, but in any event,

he is on the stand, if there is any problem about that.

The first document I would like to offer that was marked in the pre-trial order as Plaintiff's Exhibit 16 was the preliminary prospectus of December 30th and Plaintiff's Exhibit 17, which is the amendment number 1 to form S-1 registration statement as filed with the Securities and Exchange Commission January 23, 1969.

Those did not come in, your Honor, and I propose to offer them at this time along with some other documents.

Going to the defendants' documents, I propose to offer a group of documents, your Honor, which consist of communications between Armour and attorneys for Armour and the Securities and Exchange Commission, and I offer them for the purpose of showing those communications. They are stipulated documents from the pre-trial order. They are, respectively, A-11, A-12, A-13.

I also propose to offer, and these have been set up in chronological order in the pre-trial order, all the filings with the Commission by Host as well as these letters and communications with the Commission by Host and others to which I have referred.

So, with that in mind I will make the offer of the following additional documents beyond A-13. I will

offer A-18, A-19, A-21, A-22, A-23, A-25, which is the advertisement appearing in the Wall Street Journal of January 9, 1969 to which reference has been made earlier, A-26, which is the same document in the form of a letter to Armour shareholders, A-28, A-29, A-32, A-34, A-37, A-42, which is, your Honor, certain papers from the record of the proceedings before you in 1969 on the preliminary injunction application, and I did specify certain documents here consisting of the complaint of Sullivan & Cromwell of January 23rd, the transcript of the hearing held before your Honor on February 5th, the affidavit of John P. Glynn dated February 4th, I believe, and the exhibits introduced in evidence at that time.

By "that time," I mean on the preliminary injunction proceeding.

We have undertaken, your Honor, to obtain the record of the proceedings from the clerk here on the fifth floor and the exhibits are being copied in our office and because, of course, they are not a permanent part of the Court's file, such exhibits as haven't already been provided in one form or another will be provided later today to counsel for their convenience and to the Court.

THE COURT: How much more do you have of those exhibits? Do you have the number?

MR. McAMIS: Yes.

MR. WEISS: He gave us a lot at one time. I might have some objection.

THE COURT: That is the point. Why don't you give him at the luncheon recess the additional items that you plan to offer in evidence and if he has any objections I will hear the objections when we resume after lunch.

MR. McAMIS: No problem, your Honor, with that.

THE COURT: We will take our luncheon recess now and resume at 2:15 p.m.

(Trial adjourned until 2:15 p.m.)

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AFTERNOON SESSION

(2:15 p.m.)

MR. MC AMIS: Your Honor, at the luncheon recess I had offered certain documents -- and I will hold the offer of A-42 for the moment -- which were certain portions of the record before the court on the preliminary injunction hearing, and without exception I will offer in evidence the other documents that I have previously identified.

MR. WEISS: In other words, you are withdrawing from the record --

MR. MC AMIS: I will hold that. We'll come to that.

MR. WEISS: Your Honor, I don't think the other documents are relevant.

THE COURT: Received.

(Defendants' Exhibits A-11, A-12, A-13, A- , A-19, A-21, A-22, A-23, A-25, A-26, A-28, A-29, A-32, A-34 and A-37 were received in evidence.)

MR. MC AMIS: Your Honor, I skipped over A-34-1, which is an article in the New York Times of January 24th concerning the Armour lawsuit that had been filed against General Host the previous day, and A-35, which was the tender offer of Greyhound, announced

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January 27th. I offer those in evidence.

MR. WEISS: No objection.

(Defendants' Exhibits A-34-1 and A-35 were received in evidence.)

MR. MC AMIS: Now we come to A-42, your Honor, which I understand Mr. Weiss may have some objection to. I offer it as evidence of what was before this court at the time of the preliminary injunction motion but not as evidence of the facts, and that's the record on the preliminary injunction motion.

MR. WEISS: I object, your Honor. I don't see any relevancy or materiality at all.

THE COURT: A good many of your stipulated facts, as I read the pretrial order, were really taken from that case, some of them from the opinion.

MR. MC AMIS: Some from the opinion, some from the record, your Honor.

THE COURT: I thought I recognized them. I will take it for whatever value it has, on the same theory I took some of your exhibits. I am sitting in a nonjury case and I will pay attention only to relevant evidence.

(Defendants' Exhibits A-42A through A-42-D were received in evidence.)

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MR. MC AMIS: My next group of documents, your Honor, and I have only a few more, are A-43 through A-46, which are, again, advertisements and articles plus the amendment No. 2 to the registration statement of General Host. Amendment No. 2 was filed January 29, 1969. I offer those documents.

MR. WEISS: No objection.

(Defendant's Exhibits A-43 through A-46 were received in evidence.)

MR. MC AMIS: My next documents, your Honor, are A-51, which is simply the SEC order of January 30, 1969, declaring the registration statement effective; A-55, which is a letter dated January 30, 1969, from Grayhound to Armour stockholders concerning the Greyhound offer; A-58, 59, 60 and 61.

MR. GOULD: How about this A-54?

(Pause.)

MR. MC AMIS: May I revise my offer, your Honor, to offer A-54 through A-61, with the exception of A-57, which has already been admitted as Plaintiff's Exhibit 60.

MR. WEISS: Didn't we mark A-55 on our case as another document, January 31st?

MR. MC AMIS: I think you just referred to

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it in argument.

THE COURT: Gentlemen, I must say I don't understand why this wasn't done before.

MR. MC AMIS: I thought it was agreed to, your Honor.

MR. WEISS: Your Honor, I would just like to make one comment. I assume that you are accepting them without ruling on relevance, and, two, I just want to point out that there is no proof as to which group of stockholders of Armour these letters were sent to.

MR. MC AMIS: There is a stipulation, your Honor, on mailing and on publication, that documents purporting to be letters to stockholders were mailed. If Mr. Weiss has some further objection, I suppose --

MR. WEISS: I beg to differ. We discussed this in our pretrial discussions, and I pointed out that there was no proof as to which record date was used for these mailings. For all I know they could have been sent to the shareholdings of record of Armour in December. So as far as accepting it in evidence for whatever it is worth --

MR. MC AMIS: Mr. Weiss has agreed, as I understand it, that they have been mailed on or about

the date indicated --

THE COURT: What is the date indicated?

MR. MC AMIS: Of course, they vary, your Honor. There is a letter dated January 9th and proxy material dated January 17th. Then there is a letter that Armour sent to its stockholders enclosing the Greyhound offer and that's dated January 31st, and I do not understand that there is any dispute as to mailing on or about the dates indicated on the letter.

MR. WEISS: Your Honor, the point is that letters, proxy statements are normally sent to record holders at a given date, there is no proof as to what date was used --

THE COURT: That's a significant issue, and you have got to get the original records of the mailing. I am not going to spend time on it. It seems to me this is an item that should have been taken care of before.

MR. GOULD: I think it was, your Honor.

THE COURT: If Mr. Weiss is raising this point for the first time --

MR. WEISS: It is not the first time. I did raise the objection previously.

THE COURT: Then get the original records.

They are available, whether you have to send to Chicago for them, Jersey City or elsewhere. I will keep the case open to get those in.

MR. WEISS: We don't need the records. All we want is the date.

THE COURT: You are making the statement now, but it is something that should have been disposed of before, and even the business of reading these exhibits into the record is something that should have been done at a pretrial conference before the trial. Here we started at a quarter past 2 and now it is 10 minutes to 3, and we still haven't gotten them.

Get the original records.

MR. GOULD: Your Honor, we have a stipulation here that the following exhibits which the defendants expect to offer are authentic, that each document purporting to be mailed was mailed to the persons indicated thereon, that each document purporting to be published was published on the date indicated and that each party waives objection under the best evidence rule, but each party reserves all objections based only on --

THE COURT: And Mr. Weiss stated that it doesn't indicate to which stockholders as of which record date.

MR. GOULD: Will your Honor let me continue. Now, we do have dates on them. Item 36 refers to the fact that a notice and proxy statement was mailed by Armour management to holders of common stock of Armour as of January 2, 1969. Then the actual notice, the exhibit, includes a reference to the fact that it was sent to holders of common stock of record at the close of business on January 7, 1969, so we do know what the record date was for the use of all these mailings.

MR. WEISS: All right, the ones that we have dates for, I will take the attorney's representations that those are accurate dates.

THE COURT: No, he is not asking you to take his representation. You have a stipulation now. You agree to it.

MR. MC AMIS: Your Honor, before I resume my questioning of Mr. Ashton: my understanding of your Honor's ruling this morning was that decision on the motions was reserved. I did make a motion to strike certain evidence. Was it your Honor's intention to reserve decision on that?

THE COURT: I did intend to reserve on that too, but I did intend to ask Mr. Weiss to respond to that and he didn't respond at all to that part of

the motion. So we will let it stand as it is now.

(Defendants' Exhibits A-51, A-54 through A-56 and A-58 through A-61 were received in evidence.)

MR. MC AMIS: Your Honor, this morning I mentioned Exhibit 17 and I believe that was included in my previous offer but when the clerk read the numbers into the record he didn't read that number, and I just want to make sure it is in, and I offer it as Defendants' Exhibit 89.

It's your 17.

MR. WEISS: Our 17? Yes.

H A R R I S J. A S H T O N resumed.

DIRECT EXAMINATION CONTINUED

BY MR. MC AMIS:

Q Now, Mr. Ashton, what, if anything, did Armour do after the announcement of the General Host offer?

THE COURT: Which announcement are we talking about?

Q The December 23, 1968 announcement, that you identified this morning?

A The date you identified, please, again?

Q December 23, 1968.

A All right. On January the 9th, Armour

published the full-page ad in the Wall Street Journal, which the next day was published in the New York Times and then was published throughout -- in selected papers throughout the United States. Prior to that, on December 2nd -- on January 2nd; excuse me -- 1969, Armour's attorneys furnished the SEC with a memorandum concerning our proxy material and also our preliminary prospectus.

MR. WEISS: I object and move to strike this testimony.

THE COURT: Strike the latter part.

MR. WEISS: And I can't hear him.

Q Go ahead, Mr. Ashton.

A Armour & Company also sent to its shareholders on January 17th proxy material in connection with the coming February 21st annual meeting of shareholders.

MR. WEISS: I move to strike that.

THE COURT: Isnt' that stipulated?

MR. WEISS: I don't understand why he has to testify to it.

MR. MC AMIS: Very well, let's proceed.

A On January 23, 1969 Armour & Company made an offer for Klara of Kentucky, where they were to issue at $75 a share stock which had been selling in the over-

the-counter market at a price between $17 and $20 per share and had a loss in its latest fiscal year of approximately $800,000.

Q What price was Armour offering?

A Armour was offering the equivalent of $75 at market value in their securities.

Q Now, Mr. Ashton, coming to the prospectus, you indicated that Mr. Downey, at the Lovejoy firm, had been involved in its preparation. Who else at the Lovejoy firm?

A Well, I also know that Mr. Murphy was involved in its preparation.

Q Anybody else?

A I assume other people would have been involved, Martin Stoll probably in Texas, but I don't recall.

Q Did you review the prospectus?

A Yes, I did.

Q Did you review each draft of the prospectus as it went in?

A I would review each proof. Now, when you say draft, I am not quite sure. But each draft as it came off the printer I would have reviewed.

Q And you would have reviewed the amendments

as they were filed with the Securities and Exchange Commission before they were filed?

A That's correct.

Q In January of 1969, at the time of the prospectus, did you consider in your capacity as president of Host whether the exchange offer, if successful, would result in Host having control of Armour's board of directors?

A Yes, I did.

Q And did you make any conclusion in that respect?

A Yes. I make a conclusion -- I make a difference between having the control block, which I set forth in my affidavit in the Justice Department's action out in Chicago. When you had 51 per cent you had a control block of stock. That doesn't mean that at that point in time you have what I call effective operating control of the company.

We always realized -- and this was the point I was making in that affidavit -- that although we would be acquiring the control block of stock, we would not at that moment in time have control, and the Justice Department would still have time to come forth with an action to prevent us from going further along

in our thing. I knew at that point in time that we would have the controlling block and it would only be a matter of time until you could take effective working control.

Q Did you consider how much time it might be, Mr. Ashton?

A Yes. I considered it the maximum, seeing as the annual meeting was scheduled for February 21, 1970, that it would be --

Q You mean the Armour annual meeting?

A The Armour annual meeting -- excuse me, of '69, it would only be a matter of two years, and the date from the 14th to February 21st to take control of Armour & Company.

Q Would you explain the basis for the conclusion?

A Yes, the basis for the conclusion is that you needed at the maximum three annual meetings to get control.

Q Why?

A Because of their staggered board, and the first annual meeting was already scheduled for seven days after the tender offer, and the next two would take place within two years thereafter.

Q And the board was divided, according to

your understanding, in what way?

A The board was staggered six for those coming up at the 1969 annual election, five coming up at the election the year after, and six for the year after.

Q Did you give any consideration at the time of the prospectus to whether Host might obtain control in less than the period you have just testified to?

A Yes. I think that it was generally felt that once we got 15 per cent of Armour & Company, that we would get control in a shorter span of time than the two years, and in effect that's what happened.

Q Now, what was the basis for that conclusion that you might be able to do that?

A There were several reasons. No. 1, it was our position, and we had the opinion of Connally, Bove & Lodge, Delaware counsel, that the stockholders retain the right to amend the bylaws. By amending the bylaws we could provide such things as shareholders can call a stockholders meeting if they had 25 per cent or more of the stock, that we could elect the president of the company or the chief executive by having the stockholders elected, that we could amend the bylaws to increase the number of directors.

Q Any other way by which you could take control

in less period than two years?

A Yes, I think there was a reasonable assumption that certainly the management directors of Armour or the directors who represented management, other than those that had a substantial ownership equity interest, such as William Wood Prince -- but I am referring to Dwenson, to Terry White, to Evan Collingswood, to Cliff Cox -- that at such time as the position of ownership was established, that those directors would go along with the majority stockholders.

Q And why did you single out those directors, Mr. Ashton, whom you have just named?

A Because they were management directors who were earning their livelihood as professional managers with Armour & Company.

Q Now, in your answer you mentioned an opinion of counsel relating to an amendment of the bylaws by shareholder vote.

Let me show you the document that has been admitted into evidence as A-61 and ask you if that is the opinion to which you have reference?

A Yes, it is.

Q Did that opinion come to your attention on or about the date indicated, February 7, 1969?

A Yes, it did.

Q Now, at the time of the prospectus, again, Mr. Ashton, did you give any consideration as to whether Host could pay the interest on the debentures that they were proposing to issue at the exchange offer?

A I considered it before the date we ever made an announcement. I considered it on January 30th and firmly convinced myself and satisfied myself that Host had the financial capability of servicing its debt.

Q In what way?

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A First, I satisified myself that they had sufficient cash flow based on the current cash flow projections.

Q Stopping there for a moment, did you have a schedule of cash flow figures available to you at that time?

A Yes, I did.

THE COURT: You said, "we had a sufficient cash flow." To whom were you referring then?

THE WITNESS: I am referring to General Host Corporation, your Honor.

Q Were these cash flow figures in the form of a writing, Mr. Ashton?

A Yes, they were.

Q A document has been introduced, which is a memorandum addressed to you from Mr. Day dated January 30, 1969, and if I can find it in my papers here, I will show it to you, but I would like to ask if you are familiar with that document and if that is the document to which you refer.

MR. McAMIS: That is Plaintiff's Exhibit 24 in evidence, your Honor, which I have handed to the witness.

A Yes, I'm familiar with this document.

Q Did you receive that document on or about January 30, 1969?

A Yes, I did.

Q Did that document form the basis for your conclusion to which you have just testified that Host had sufficient cash flow available to it to meet its obligations?

A This is the document I was referring to as of January 30th. Obviously I looked at other documents prior to this.

Q Now, did you make any conclusions, Mr. Ashton, as to how long Host could continue to service this indebtedness out of its cash flow at that January 30th date?

A Yes, I came to the conclusion that General Host Corporation would have sufficient cash flow to service its indebtedness through at least three annual meetings of Armour.

Q Is there anything in that document that bears on that?

A Yes, this document shows pro forma cash flow for 1969 and for 1970.

Q Would you explain the concept of pro forma cash flow as is on that document?

A The simplest way to explain it is that cash

flow itself is your profit before tax.

Q Whose profit?

A Are you asking me any cash flow or do you want me to specifically address myself to this one?

Q Yes, to this one, to this document.

A The cash flow of General Host Corporation. That would be the profit before tax adding back to depreciation and amortization and deducting any cash outlays that you intended to make during that period.

Q Was cash flow from Host's operations the only scurce it had available to pay this interest and meet its obviously other obligations?

A No, it was not. General Host Corporation could have sold its assets which had been evaluated by Laird & Company at that time at over $70 million.

Q Did you give consideration to that in 1969?

A Yes, we did. General Host Corporation could have converted its debentures at that time, the debentures --the time of the offering, I believe, on the front of the prospectus, it gives the price of General Host and I imagine it would have been about $39 a share, and I don't remember exactly, but the debentures were convertible at $27 a share and by doing that you could have saved two million, three in interest and added 47 million, four

to your equity.

Q Just so the record is clear, Mr. Ashton, by doing what?

A By calling the debentures and causing conversation.

Q By debentures do you mean the--

A The 5 per cent convertibles.

Q Which were an issue of debentures already outstanding at that time?

A Yes, they are the 47 million, four--$400,000 private placement.

THE COURT: Is that the privately placed loan?

THE WITNESS: Yes.

THE COURT: Now, explain that conversation set-up again. Who had the power of declaring a conversation?

THE WITNESS: We had the power to call the debentures and with the market being 7 points--with the market being 12 points over what it is rather than somebody surrendering their debenture they would convert them because they could convert and get a market value above the amount of the conversation price.

B2 Q Are you saying that the market was 12 points over the conversion price, Mr. Ashton?

A That is correct.

Q At that time?

A Yes.

Q Is that reflected in the prospectus? Do you have a copy of the prospectus?

A I do not have a copy in front of me, but on the cover page of the prospectus it will generally state the market value, and it says on January 28th, the last reported sale price for General Host common stock on the New York Stock Exchange was 39.63, and then I'm sure in here it gives, and I don't remember the specific page, but it will state that the 5 per cent convertible debentures are convertible at $27 per share.

Q You have indicated that Host had the right to call these debentures. For how long did Host have that right; do you recall?

A Host could do that at any time during the time the debentures are outstanding.

Q And the debentures were due when?

A The debentures are due in 1990, if I'm correct, but that is also set forth here in the capitalization table, and the 6 per cent--I'm wrong. I have confused those with the 6 per cent cumulative financing. The 5 per cent convertible subordinated notes are due June 15, 1988.

Q And conversion could be forced at any time up till that date; is that correct?

A That is correct.

Q And you are referring now to page 13 of the prospectus?

A That is correct.

Q And the capitalization table on that page.

What other methods, if any, did you consider besides the ones you have testified to as possible sources of payment?

A General Host Corporation had the option to issue more additional equity. It had the option to issue debt securities.

Q When you say additional equity, are you referring to the conversion that you just talked about?

A No, I'm referring to either selling common stock, selling a preferred--convertible preferred, et cetera, various types of securities. They could also have sold debt either publicly or privately, such as the placement of convertible notes. They also could have borrowed.

As you know, we had an additional $6 million line under our $20 million bank loan.

Q When you say an additional $6 million line, will you explain tha ?

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A Yes, we had a loan commitment for $20 million. We had only drawn $14 million down. We also had $10 million in cash and $2 million in short term marketable securities at the year end, at December, 1968.

In addition, General Host owned its plants or --not all of the plants, but owned quite a few of its plants and certainly could have entered into sale leaseback arrangements. General Host owned a sizeable fleet of trucks and certainly could have done a sale-leaseback on its trucks and vehicles.

In fact, that is a common way today of financing your fleet, to enter into a leaseback arrangement.

Q Now, Mr. Ashton, you had indicated that on this line of credit the $20 million and $6 million remained to be drawn down.

When had that line of credit been established?

A Well, the date was as of November 1st. The actual--

Q November 1st of what year?

A As of November 1, 1968. One bank didn't actually sign up until November 15th, if I'm correct, but effectively the term of it was as of date, as of November 1st.

Q Did you give any consideration to the amount or

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amounts that could possibly be raised by any sale and leaseback arrangement in January 1969?

A Well, I think I gave consideration to the total amount. I specifically retained Laird & Company to look at what we could get for--for all of our businesses and I also had them check the cash flows and they rendered an opinion that, if I recall, at that time they said a probable range was between, let's say, $70 million and $80 million and they updated that opinion later to make it, I believe, $81 million as the probable.

Q That is $81 million proceeds from the sales of assets?

A That is correct.

Q Did you consider in January 1969 that Host would or might be required to borrow money?

A No. At the time the registration statement became effective and at such time as the exchange offer itself took place I was convinced that Host had sufficient cash flow, with the exception of the 9.4 million dollars of long term insurance money that had to be replaced in August of 1969 for which I had an opinion that stated that we'd have no problem raising that for a firm that had raised $47 million, four without as owning 50 per cent of Armour & Company. I certainly had every confidence that

we would be able to raise money when we would have all of that collateral unencumbered.

Q Now, let me see if I understand your answer, Mr. Ashton. Are you saying that except for the insurance company loan of 9.4 million you did not contemplate borrowing in January 1969?

A I should put one caveat on it: Other than using the $6 million line that we had already established as part of the $20 million package.

Q You indicated that you did expect to need to refinance that loan. Would you explain that? How had it come about that that was required to be repaid and what did you expect to do about it?

A General Host Corporation had this long term financing which was 5.25 per cent notes of insurance companies headed by, I believe it was, the Equitable and Mutual of New York and there might have been New England. That was the third one.

At the time we were making the exchange offer the rate was 5.25 per cent.

Q You mean the rate on the loan?

A That is correct. If I recall, it was a 5.25 per cent rate that we had on the loan.

THE COURT: Was that on the $9,400,000 loan?

THE WITNESS: Yes, your Honor, and the insurance companies obviously were not going to sit there with a 5.25 per cent rate.

Q Why do you say obviously?

A Because the rates were higher at that point in time.

Q That is--

THE COURT: The insurance rates.

A The insurance rates. They, in effect, said: We will give you till August of 1969 to refinance this. In effect, at that point in time we thought there would be no problem doing that.

Q Why did you think there would be no problem?

A I had an opinion of Allen saying that there would be no problem doing it, plus the fact that we would have $180 million even if you took Armour at $50 a shares--that that would be the value of over 3,000,000 shares of stock, so that I felt in my own mind that we had plenty of collateral.

B3

Q Let me show you the document that has come in as Plaintiff's Exhibit 60, which is a letter dated February 4, 1969 to you signed by Herbert A. Allen and I will ask you if that is the opinion that you had reference to?

A That is correct.

Q I believe you said, Mr. Ashton, that based on this opinion you did not anticipate that it would be difficult to accomplish that refinancing; is that correct?

A That opinion in my general knowledge of the financial structure of the company, plus the financial environment at the time.

THE COURT: You assumed you would have to pay a higher rate of interest according to that?

THE WITNESS: Yes.

THE COURT: You didn't anticipate any difficulty in refinancing the loan itself?

THE WITNESS: That is correct.

Q Were funds difficult at the time to obtain if one were willing to pay the current rate of interest?

A Not in January of 1969.

Q Did you have any belief, Mr. Ashton, in January 1969 as to whether Host would be able to borrow more than the 9.4 million, if that became necessary?

A Yes, I was convinced with all of our assets free to be encumbered plus with the 51 per cent of Armour & Company that we would have no problem borrowing money.

Q What was the value of 51 per cent of Armour & Company?

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A 51 per cent, depending upon what you take, the outstanding capitalization as of this date, as of the date of the prospectus, you were talking about 6,095,000 shares.

Now, as you subsequently know, you were talking about additional shares.

Q That is Armour issued some additional shares?

A Yes, but let's take 3 million shares, roughly, and forget about the other 42.5 per cent--42,000--the other fractional amount and take it at $65 a share, which was the market value on the date of this prospectus and you see that you were talking about $195 million.

Q And if Host obtained 51 per cent in the exchange offer, were those shares in any way encumbered in Host's hands?

A No, they were not.

Q Host was issuing debentures in exchange for these Armour shares, debentures plus warrants, was it not, Mr. Ashton?

A That is correct.

Q But sticking with the debenture portion of it, when were those debentures payable?

A Those debentures are payable on February 1, 1994.

Q And they carry an interest rate of what per cent?

THE COURT: Seven.

A They carry a 7 per cent coupon.

Q Is there any sinking fund provision?

A There is no sinking fund or amortization provisions.

Q So the full amount becomes due and payable on maturity?

A That is correct.

MR. McAMIS: No further questions, your Honor.

THE COURT: Do defense counsel have any questions of this witness? Mr. Gould?

MR. GOULD: I have nothing, your Honor.

MR. DUFF: I have nothing, your Honor.

THE COURT: Plaintiff may cross examine.

XXX CROSS EXAMINATION

BY MR. WEISS:

Q Mr. Ashton, prior to February 14, 1969 had you or anybody else on General Host's behalf tried to obtain bank financing from other sources other than the company that you had the $20 million arrangement with?

A Mr. Weiss, you say a company. It was a consortium of three banks.

Q Other than those three banks?

A To my knowledge, no.

Q You made no attempt?

A That is correct.

Q And you don't know of any attempts made by anybody on General Host's behalf?

A Not that I have knowledge of.

Q Were there ever any contentions made by General Host during the Greyhound competition in the Armour opposition to the General Host exchange offer that there was interference with your banking arrangements?

A Yes. In my affidavit in the antitrust case in Chicago I specifically referred to the fact that the Armour treasurer, Mr. Spear, had written to Harry Volk, who was the president of the Union Bank, one of our banks, and I think it subsequently came out that he wrote to 30 other banks in the United States.

Q And did any bank evidence to you during or prior to February 14, 1969 that you would have difficulty borrowing money from them?

A No.

Q Never?

A No.

Q How about after February 14, 1969?

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A After February 14, 1969?

MR. McAMIS: Objection, your Honor, outside the period.

THE COURT: What is the relevance of that?

MR. WEISS: I want to find out if it was so easy to borrow all these moneys--

THE COURT: As of the date of the issuance of the prospectus.

MR. WEISS: I understand, your Honor, but maybe I can relate it back. This is cross examination.

THE COURT: You said it the other day too and I took it, but so you'll be under no misapprehension, we are concerned with a specific date here.

MR. WEISS: I understand, your Honor, but I would like to know what the conditions were that occurred almost immediately thereafter that weren't foreseeable then to this gentleman at the time.

THE COURT: If they weren't foreseeable, what difference does it make?

MR. WEISS: I want to know what those conditions were.

THE COURT: I will let you ask a question only to save time, but I don't want you to be under any misapprehension that you can go foraging as if you were

conducting an examination before trial.

A What is your question?

Q What were the conditions?

THE COURT: It is a general question. Now, be a little more specific. If you go a few months beyond that you have a cataclysmic change of condition that may turn a given situation upside down.

Q Did there come a time when General Host could not raise funds sufficient for its needs?

A No.

MR. GOULD: Objection.

THE COURT: He has answered it.

Q Did there come a time when a memo was prepared evidencing that you needed $40 million to $50 million?

MR. GOULD: Can't we get some stipulation on time? What is the use of asking him a question that may embrace 1974 or 1975?

THE COURT: What period are you referring to now, Mr. Weiss?

Q Mr. Ashton, when you answered "no," was that because you made borrowings after you entered in an agreement with Greyhound Corporation?

A No. You asked the question did there ever

come a time when we couldn't borrow the money we needed. I said no, we have always borrowed the money. I had debts out on interest on the seven. We were never in default under an obligation. We have never been in default under covenant of a loan agreement. We have been currert and constant the whole time.

Q Prior to the time you entered into the Greyhound arrangement which was announced on June 25, 1969-- is that correct?

A Please repeat it. I didn't follow.

Q Prior to June 25, 1969 when you entered into arrangements with Greyhound had you attempted to borrow moneys from banks or any other institutions and not succeeded?

A First of all, there was no agreement on June 25, 1969, so you have got something wrong there.

B4 Q Was there an announcement to the public?

A There was an announcement on June 24, 1969, but it was not an agreement. It merely stated on June 23, 1969 we negotiated with Greyhound as to whether they would sell to us or we would sell to them. We came up with a proposal whereby we would issue them a half share of common stock, $15 in cash, $50, 7 per cent note for debenture to be amortized over five years.

They came back with a proposal where they were going to give us Greyhound's food service assets, a put of $65 million. If we didn't think it was worth that within a year that Armour itself would pay out $25 in cash, make a tender offer for its securities--pay out $25 in cash, a $40 preferred stock that would be amortized over five years and also give warrants, two warrants to purchase Greyhound at $25 a share.

The conservative value of that package was approximately 200--a low side was $216 million, a high side $274 million. Prior to that you asked me whether we had any trouble borrowing money.

Yes, we tried to borrow $150 million and could not borrow it.

Q Why did you need the $150 million?

A We were talking with Greyhound to buy them at $32 a share cash.

Q What did you have to buy out Greyhound?

A We didn't have to buy out Greyhound.

Q Why did you have to try to borrow any lesser amount of money?

MR. McAMIS: Will you just note my continuing objection, your Honor?

THE COUR ': You just got up now to note your

objection.

MR. McAMIS: I just want to make sure that it is on the record.

THE COURT: You made it this morning.

A What was your question, Mr. Weiss?

Q Did you try to borrow moneys for any other purposes prior to June 24th where you couldn't?

A Yes, we did.

MR. GOULD: Objection, your Honor.

THE COURT: I will sustain the objection. I don't understand what the purpose of borrowing $150 million in order to acquire the stock that Greyhound had has to do with this case.

There was a discussion of buying the Greyhound shares at $82 a share and I think we are wondering a bit now.

MR. WEISS: What I am asking is whether he attempted to borrow funds for any other purpose other than to purchase the Greyhound and Armour shares.

THE COURT: Within what period?

MR. WEISS: Prior to June 1, 1969.

THE COURT: It may be answered.

A Yes, we attempted to borrow additional funds during that period of time.

Q Were you able to?

A Yes. Well, actually, we did borrow additional money, but the transaction itself, if I believe correct, was in August of 1969.

THE COURT: That is subsequent to the date he asked.

Q I am asking whether you made any attempts prior to June 24th to borrow money from any lender for purposes other than the purchase of Greyhound's and Armour's interest?

THE WITNESS: The problem I have, your Honor, is that you start at one period but you don't complete it until August.

If I answer his question prior to February 25th--

THE COURT: All right, then your answer stands.

Q Were you ever turned down or told that you couldn't borrow funds prior to June 23, 1969 other than the $150 million request that you testified to previously.

MR. GOULD: I object to this.

THE COURT: Objection sustained.

Q You spoke about the $20 million loan that you had prior to February 14th, is that correct?

A That is correct.

Q When was that loan entered into?

A I testified that I think the date is an as of November 1 date, I think there was one bank, the Bank of Commonwealth, that didn't actually execute the agreement I believe until the 15th of November.

Q And what was the purpose of that loan?

A The purpose of that loan was to purchase shares of Armour common stock in the open market.

Q Was that the specified purpose of the loan?

A I can't tell you what the specified purpose is. If you mean if it was a nonpurpose or a purpose loan, I don't know. I think the document will have to speak for itself on that. What I am saying to you that

we used the funds to buy 252,000 shares of stock.

Q All right. I show you -- I don't know if this is marked --

MR. WEISS: I would like to have this marked for identification.

(Plaintiff's Exhibit 2 was marked for identification.)

MR. GOULD: Your Honor, my record shows that Exhibit 2 is the 1968 report of General --

MR. WEISS: That is 62.

THE COURT: I don't know what's going on. I wish you gentlemen would straighten it out.

MR. GOULD: Apparently somebody has made a mistake on the numbers.

MR. WEISS: We have to number this 62, because we designated the documents --

(Plaintiff's Exhibit 62 was marked for identification.)

Q Mr. Ashton, was there a compensating balance provision attached to that $20 million loan commitment?

A I can't honestly tell you that at this time. If you show me the document I will try to find it.

Q I show you Plaintiff's Exhibit 62 for

identification.

A I don't see such a provision in here. If there is one, if you will call it out to me, I will be happy to look at it, but just by reviewing it paragraph by paragraph and the headings, I don't see anything that says "compensating balances."

MR. WEISS: May I mark for identification as Exhibit 63 a call report signed by William Wendel Morrisset, dated March 30, 1969.

(Plaintiff's Exhibit 63 was marked for identification.)

MR. GOULD: May I inquire if counsel proposes to offer this document, this document being Exhibit 63 for identification?

MR. WEISS: Yes.

MR. GOULD: You propose to offer it?

MR. WEISS: I am using it to refresh the witness' recollection.

MR. GOULD: You are not using it to refresh his recollection. That isn't what I heard, because he didn't have any recollection. I didn't hear him use it to refresh his recollection about anything.

THE COURT: I don't know what the discus-

sion is. There's no offer in evidence of any document. He showed you a document which you asked to look at.

MR. GOULD: I asked him if he proposes to offer it and got some kind of equivocal response.

THE COURT: The witness in the last question you put to him said he saw nothing in the document you showed to him and he invited you to call his attention to some matter.

MR. WEISS: That is what I --

THE COURT: Why are we spending time? If it's there, call his attention to it if it has any significance.

Q I show you this call report dated November 1, 1968 and ask you to read that.

A Well, I've never seen this document before. I will read it if you want me to.

THE COURT: You weren't asked to read it.

THE WITNESS: I have looked at it.

MR. WEISS: I would appreciate it if he would read it.

THE COURT: For what purpose.

MR. WEISS: To refresh his recollection --

MR. MC AMIS: Your Honor, I believe the

document that has been handed to the witness hasn't been marked in any fashion, for identification or otherwise, and I object to that.

THE WITNESS: First of all, it's the damndest document I have ever seen. It seems that the bank was urging Pistell to take compensating balances, not that they asked for them.

THE COURT: What is pending now.

MR. WEISS: I am looking for the loan agreement, your Honor.

THE WITNESS: There is the loan agreement, Mr. Weiss.

MR. WEISS: Oh, I am sorry.

THE COURT: Now, what is the question, please?

MR. WEISS: All right.

BY MR. WEISS:

Q Mr. Ashton, I read from Plaintiff's Exhibit 62, marked for identification, which reads:

"The company agrees that the" --

MR. MC AMIS: Your Honor, I object to reading a document not in evidence.

THE COURT: Objection sustained.

Q Do you have a copy of Plaintiff's Exhibit

24, Mr. Ashton?

A Yes, I do.

Q Will you please look at it.

Now, before we do that, is there anything in the prospectus marked as Exhibit 23, other than under the antitrust aspects provision on page 9, that indicates that General Host may have to sell its assets or to enter into dissolution of any of its divisions to raise capital to meet its debts in the future?

MR. MC AMIS: Objection, your Honor. The document speaks for itself. He's been asked to review a long document and see if anything else can be found.

THE COURT: Well, he may do that.

THE WITNESS: Would you ask the question again, Mr. Weiss.

Q Is there any statement in the prospectus, other than under the antitrust aspects on this page 9, that indicates that General Host may have to liquidate any of its assets in order to raise funds for payment of debt in the fugure?

MR. WEISS: I withdraw the question.

Q You testified that General Host in fact got control of Armour within two years, did you not?

A That is correct.

Q When did it get control of Armour?

A May 7th --

MR. GOULD: I object to that.

MR. MC AMIS: I object. That is outside the period.

MR. WEISS: That was on direct examination. He said they got control within the two years.

THE COURT: I didn't understand him to say that.

MR. WEISS: That's exactly what he testified, that they got control in two years.

Q Am I right?

A That's what you asked on cross.

Q No, it was on direct.

You said that that's what happened.

MR. GOULD: There's a difference between getting control and getting a majority on the board of directors, and I think what happened is that Mr. Ashton responded by saying that it didn't take as long as two years to get a majority.

MR. MC AMIS: That's eventually what happened.

MR. GOULD: That doesn't eliminate the

inherent defect in the question. What difference does it make?

THE COURT: Sustained as to form.

Q Mr. Ashton, did General Host have operating control or represent a representation of more than 50 per cent of the board of directors of Armour at any time prior to the time when it entered into an agreement to sell its Armour holdings to Greyhound?

MR. GOULD: If your Honor please, I must object again as to the form, and may I respectfully suggest that if what he wants to elicit from the witness is whether there ever came a time when a majority of the members of the board of directors were designees of Host, that's a very different question.

THE COURT: I will sustain the objection. First, there are two parts to it, and then one part of it leaves it open to the witness to interpret what you mean by the expression "operation and control."

I think you ought to get down to specifics here in terms of what you are contending for as far as the board is concerned, whether they had the power at the time, considering that the board is on a staggered basis, whether they had the votes. I will allow you to pursue that area.

BY MR. WEISS:

Q All right. Mr. Ashton, prior to February 14, 1969 you testified you were aware that Armour had a staggered board and cumulative voting provision, is that correct?

A That is correct.

Q And that you also were aware that the next meeting was February 21, 1969?

A That is correct.

Q How many treasurers did you believe you had the power to elect by vote at the February 21, 1969 meeting, prior to February 14, 1969?

A Well, we actually elected four. What I had the belief we could do. I had the belief we could elect many, many more dealers than that.

THE COURT: Well, there weren't many more to be elected. There were seven at that next meeting.

THE WITNESS: There were six, but, your Honor, the stockholders, according to the opinion of Connally, Bove & Lodge, retained the right to amend the bylaws. We could have increased the number of shares and with the additional shares elected additional directors.

THE COURT: But under the existing bylaws

you elected four out of six on that February meeting?

THE WITNESS: That's correct.

THE COURT: And based on the opinion of counsel, a copy of which is in evidence, you believe that the stockholders had the right to increase the number of directors?

THE WITNESS: Your Honor, I believed the stockholders retained the right to amend the by-laws and that subsequently was incorporated and codified into the Delaware law.

BY MR. WEISS:

Q Mr. Ashton, this letter from Connally, Bove and Lodge is dated February 7, 1969. Did you make any inquiry concerning the subject matter of this letter prior to that date?

A Yes, I did.

Q Of whom?

A I made it of my own counsel. I discussed it with Joe Flom of the Skadden, Arps firm. I had general discussions, I might have discussed it with Holtzmann, Weisberg.

Q This letter states:

"To our knowledge, there are no reported opinions which have been addressed to the precise issue

under consideration."

Did anybody give you an opinion based upon an authority prior to February 7, 1969?

MR. GOULD: I object to that as to form.

MR. MC AMIS: I join, your Honor.

THE COURT: On what grounds?

MR.GOULD: What does the word "authority" mean?

They aren't even giving a decision based on a reported decision.

THE COURT: I think I know what he is referring to.

Was there any recorded decision by any court?

MR. WEISS: Or any statutory provision.

THE COURT: Are you withdrawing your objection?

MR. GOULD: Not now. He's changed it again.

THE COURT: Confine it to any court decision.

A I don't recall any court decision being referred to.

Q Was any statutory provision of any state

legislature brought to your attention that permitted such an election?

THE COURT: Any state legislature? Aren't we concerned with a specific state?

MR. WEISS: The State of Delaware.

THE WITNESS: Have you amended your question now?

MR. WEISS: Yes.

A You get a different answer. If you are using the State of Delaware, I think there, again, there was nothing in the statute, and counsel said that, but was counsel's opinion that under the common law these rights were retained by the shareholders.

Q But there was no reported decision on that?

A To my knowledge, there was no reported decision.

THE COURT: He said that.

Q Was there a provision that required a vote of the board of directors to put the proposal to the shareholders?

A No, there was not.

Q You knew that for a fact?

A I know that for a fact now. You are

talking about bylaws. Now, don't get confused about corporate action. There are certain corporate actions that the board has to take action on, there are others that they don't have to take action, and the statute has been amended to codify this --

Q I am talking about 1969.

A You can see it is codified to show that the shareholders retain that right, you can't take it away from them.

Q That was by statute?

A Yes.

Q When was that statute enacted?

A I may be wrong. I believe June or July of 1969 the statute was amended.

Q Is that when it became operative, is that your testimony?

A That's my understanding.

Q Do you know the section?

A No, I do not.

Q And prior to that?

A Prior to that there was nothing in the statute.

MR. BROWN: Objection, your Honor. Asked and answered.

MR. WEISS: All right.

Q Now, Mr. Walsh of the Connally, Bove & Lodge firm states that in his opinion"a Delaware court would rule, notwithstanding the above Article 10 provision, that the shareholders retain the power to amend the bylaws and the subject proposal therefore is a proper matter for shareholder action at the forthcoming meeting."

Do you recall reading that?

A Yes, I did.

Q Did you read that to mean that you had to get that result?

A No, I did not.

Q How did you think you would get that result?

A By introducing the resolutions at the Armour annual meeting.

Q And if it was turned down by the board of directors at the Armour annual meeting, what then?

MR. GOULD: I object to that, your Honor.

THE COURT: Well,you are going into a hypothetical situation. I think we are wasting time on this. Really I do.

Why don't we take our midafternoon recess at this point.

(Recess.)

BY MR. WEISS:

Q Mr. Ashton, when did you first consider alternative ways of getting control, operating control, of the Armour board of directors?

MR. GOULD: I object to that. I mean to this case.

THE COURT: I will allow it. You may answer.

A Well, I'm sure that we started considering it the first time we took a 16.5 per cent investment in Armour.

Q That was when?

A That would have been back in August of 1968. We looked at all possible waysd to maximize our return on that investment.

Q And did y ou consult anybody concerning the manner in which you could go about getting control?

MR. GOULD: Objection to that.

THE COURT: I will allow it.

A I don't know what period of time you are talking about, but confining myself to the period, once we made the decision to make an exchange offer, as I said, we consulted not only with Joe Flom, who not only,

in my opinion, is probably the leading expert in the field, we consulted the Connally, Rove & Lodge firm, we talked to our own counsel, we talked to Jenner & Block, Herb Jenner, who is also a leading attorney in the United States in these areas. So we did talk to several people.

Q Did you talk to Mr. Jenner concerning the Illinois proceeding that the U. S. Government instituted?

A I think the --

MR. MC ANIS: Objection -- excuse me. Withdrawn.

A I think the thing we talked to Jenner about -- and I want you to understand that although I talked to Jenner I didn't conduct the day-to-day negotiations with Jenner -- the thing that originally we were talking to Jenner about was representing us so that we would have somebody before Judge Julius Hoffman that was admitted out there or was a local attorney in the Justice Department.

Q Prior to that did you discuss with any other counsel or any other person whom you considered an expert the alternative mechanisms that might be available to General Host to get operating control of Armour's

board of directors by means other than a staggered board election over a three-annual-meeting period?

MR. MC AMIS: Objection.

MR. GOULD: Objectio..

MR. MC AMIS: Operating control, your Honor.

Q Elect more than 50 per cent of the board of directors of Armour.

THE COURT: Answer the question.

A Yes. As I testified before, I considered the option that we would have as a 51 per cent stockholder, the options available to us. Among those was the ability to amend the bylaws.

Q And when did you first discuss that as an option?

A Well, that had been discussed as way back as October, of what rights a shareholder retains in a corporation.

Q And did that indicate that one of the ways you could go about getting more than 50 per cent --

A We discussed the Connally, Boyd & Lodge opinion.

Q Now, when you discussed with Mr. Jenner the approach to take in terms of the U. S. Government action

against General Host in Chicago, did you discuss the staggered situation and the cumulative voting?

A I don't remember what I discussed with Jenner specifically, but we discussed it with hi because the annual meeting was held in Chicago and I am sure Bert Jenner or Sam Block or one of his associates attended with us.

Q That was on February 21st, isn't that correct?

A Yes.

Q But didn't Mr. Jenner appear for General Host before Judge Hoffman in the middle of 1969?

A Here I am not sure. He might have appeared before Judge Hoffman as early as October 23rd when Armour brought its first action seeking a declaration of our intent under the Act and, after consultationwith Judge Hoffman, withdrew, but I would assume that the record will show, I think the second suit was brought by the Justice Department on the 20th of January, and I believe that he would have appeared on the 20th of January before Judge Julius Hoffman.

Q Did you discuss with Mr. Jenner what would happen in advance of that hearing? Did you prepare with him the presentation that General Host would make?

A Well, I doubt very much whether I did it personally, but somebody on behalf of General Host obviously did it.

Q And you also prepared an affidavit for submission to that court, did you not?

A That is correct.

Q And that affidavit spoke about the staggered board and cumulative voting provisions that Armour had in existence at that time; isn't that correct?

A The affidavit you have to put in perspective. Paragraph 4 states we were seeking to acquire a controlling block. I think that subsequent to that, probably Paragraph 6 or something like that, that if we get 51 per cent we will have a controlling block. However, even with a controlling block, you have got to take action before you get actual control of the company.

Q Is that the impression that you intended to give Judge Hoffman?

A That is correct.

Q Did you intend to give the impression to Judge Hoffman that you might not be able to get control of Armour -- when I say "control", I am talking about electing more than

fifty per cent of the directors of Armour in a period of less than two years?

A No. What we were trying to show Judge Hoffman is that the Justice Department would have time after an exchange offer took place to take action prior to the time that we took effective control of Armour & Co.

Q Did you not state in Paragraph 10, "It may not be possible for General Host to control Armour by electing a majority of its directors prior to the January 28, 1970 meeting"?

A That is correct.

Q Now, you set forth all of the problems that you anticipated you might have in getting control of Armour, electing more than fifty per cent of Armour's directors, but nowhere in that affidavit do you inform Judge Hoffman of these other opinions you had received at that time; is that correct?

A That is correct.

Q Why did you not?

A Because they were not relevant to this action. The question in this action was, would the Government have time, prior to our taking active control, and our position is that they would have.

Q And you said that is because of the staggered board and cumulative voting provisions you may not get control for

a period of at least two years; is that correct?

A Well, I am saying in effect that there would be a period of time. Even if you introduced the resolution at the annual meeting, it wouldn't take place on February 14th. The annual meeting was scheduled for February 20th. If you wanted to go into the courts to test that procedure, you obviously were going to take even more time --

THE COURT: Did you say February 20th for the meeting?

THE WITNESS: February 21st. Excuse me.

Q You stated in Paragraph 12 of that affidavit:

"Moreover, only six of Armour's present seventeen directors are standing for election at the forthcoming annual meeting. Therefore, even if every presently outstanding share of Armour stock were tendered, it does not appear presently possible for General Host to elect more than six directors out of the seventeen in 1969."

Did you say that?

A That is correct.

Q Didn't you have the opinion that you spoke about before from the Connally, Bove & Lodge firm at that time that you could do certain things that would enable you to elect more than fifty per cent of the board on a non-staggered basis?

A If you take a look at the opinion, what we were saying we were going to do was to introduce a resolution whereby 25 per cent of the shareholders could call a stockholders meeting. It was not our intention to go in there the first day and amend the by-laws and raise the number, although we felt we had the power to do it, the reason being, we felt that the Armour directors would resign, those that no longer had an economic interest, or if we got on the board that we would then be able to establish our position and get the non- -- the management directors of Armour other than Billy Wood Prince, to cognize us as the 51 per cent owners and to actually cooperate with us.

In fact, Mr. Prince, after the annual meeting, even said himself in the paper that he was going to do everything to cooperate with General Host.

Q Did you state in the affidavit to Judge Hoffman these plans that you had to speak to the existing Armour directors and that you thought that they would resign and thereafter that operating control of more than 50 per cent representation by General Host of Armour's board would be imminent?

A No. The affidavit speaks for itself, but it is rather obvious we did not attempt to do those things even though we could, so why would I speak about things that are purely

speculative?

Q Did you want to get operating control?

A No question --

Q Of the Armour board of directors?

A No question. In the prospectus itself, we said that we would take such action -- and I can't remember the exact provision of it here -- that we would take steps not only by soliciting proxies but other steps to seek operating control of Armour & Co.

Q And one of these other steps was the proposal to request the holders of 25 per cent or more of the outstanding common stock to call an annual meeting -- a special meeting; is that correct?

A That's correct.

Q And did you say to Judge Hoffman in your affidavit or any other way that you intended to do that?

MR. GOULD: Your Honor, I think we have had that three times.

THE COURT: Well, that is right, but if counsel thinks it is more impressive to ask it a fourth time, I will allow him to do it.

Q Did you attempt to request the holders of 25 per cent or more of the outstanding common stock to call a special meeting of shareholders at or prior to February 21, 1969 --

at or prior to the February 21, 1969 meeting?

A Yes; we did.

Q And what happened?

Q We had entered into an arrangement with the Armour management whereby they would agree to elect four of our nominees to the board. We would introduce the resolution. Mr. Prince would rule the resolution out of order, and we would preserve our rights thereunder.

Q You mean, the resolution to call a special meeting?

A That is correct.

Q And after that happened, did you do anything to implement it?

A We did not do anything toimplement it.

Q Mr. Ashton, did you own any stock in General Host

A Yes; I did.

Q How many shares?

A I --

Q This is prior to January 30th --

A I can't tell you the number of shares. It was either -- it might have been set forth in the prospectus or in the proxy statement. I don't recall right now the exact number of shares.

Q Or the number of shares represented in the prospectus as [illegible] actual amount; is that correct?

Did you also participate in the 47.4 million-dollar private placement?

A That is correct.

Q Did Mr. Pistell?

A That is correct.

Q How much of that private placement did you take down?

A Five hundred thousand --

MR. GOULD: I am going to object.

THE COURT: I was going to say, what do you mean by "participate"?

MR. WEISS: As an investor.

THE COURT: What does that prove?

MR. WEISS: I want to show what Mr. Ashton's stake in this company was and how he raised the funds to purchase it and what a failure of the exchange offer would have meant.

MR. BROWN: I object, your Honor. That is not an issue in this action.

THE COURT: Sustained. I think I have given you rather liberal scope on the questioning, but I am not going to let you run very far afield in the face of an objection.

Q Mr. Ashton, when did you first consider the language appearing on page 9 of the prospectus dated January 30, 1969?

That is marked as Exhibit 23.

A Well, I will assume -- I would assume the first time it appeared in a proof that was submitted to me, I would have considered it. Now you are asking me now, in 1975, to tell you exactly when I considered it, and I just can't do that.

Q And you read each one of the provisions under other aspects of the exchange offer personally prior to the time it was filed with the SEC; is that correct?

A Well, I either read it personally or it was read to me before it would have been filed or cleared with the SEC.

MR. WEISS: I have no further questions.

THE COURT: Redirect?

MR. GOULD: May we just have a moment to confer with eac h other on that, Judge?

(Pause.)

REDIRECT EXAMINATION

BY MR. GOULD:

Q This language, Mr. Ashton, on page 9 of the prospectus, under the heading, "Other Aspects of the Exchange Offer": you did discuss that with counsel, didn't you?

A Yes. I can't remember, Mr. Gould, right now, a specific discussion, but I was discussing the prospectus and the events that were happening day by day, minute by minute, as to what was transpiring.

Q And did not there come a time, sir, when you were informed that the Paragraphs 1, 2, 3 and 4 at the bottom of page 9 were the subject of conversations with the people at the Securities & Exchange Commission?

MR. WEISS: I object, your Honor. If the question is whether he was informed by counsel, I object.

MR. GOULD: If your Honor please, he was questioned about his understanding of it and his participating in the drafting of it.

MR. WEISS: During the discovery in this case, I was barred from inquiring into any conversations with counsel by counsel's own objection and by the ruling of the magistrate.

THE COURT: Overruled.

THE WITNESS: What is the question?

(Question read.)

A Yes. I became aware that the SEC was looking at these particular provisions.

Q And did you learn that this was the manner in which they wanted it presented?

A I can't --

MR. WEISS: Objection, your Honor.

THE COURT: Sustained.

Q Do you recall what you were told about it?

A Well, I can't remember the specific discussion, but

I knew that these particular matters represented responses to comments of the staff and also the Armour's items they were pointing out.

MR. GOULD: Thank you. That is all.

THE COURT: If there are no further questions, you may step down.

(Witness excused.)

J O H N P . G L Y N N , called as a witness by the defense, being first duly sworn, testified as follows:

MR. McAMIS: Your Honor, before I start to question Mr. Glynn, may I inquire whether my understanding is correct that the plaintiff has stipulated during the argument this morning that there are only two issues left in the case, namely, control and cash flow?

The only reason I raise any question about it is because that was my clear understanding of what the result of the colloquy between the Court and counsel was, that during the remarks by Mr. Weiss in response to the motion to dismiss, I made an informal count of two brand-new assertions and two that seemed to come back in, that I thought had just been stipulated out in these issues A to O or A to Q, and before I finish with my witnesses, I would just like to be sure I am operating under the correct assumption as to what the issues are in the case.

MP 11 Glynn -

MR. WEISS: Your Honor, the issue of Greyhound and how many shares it had at the time it made its announcements is not an new issue. It goes into the question of what was omitted concerning the ability of General Host to do certain things, and that is just a fact that demonstrates plaintiff's contentions.

It alleges that the risks were not adequately disclosed in the prospectus. As a matter of fact, the complaint at page 21 has always been before these parties: "With respect to prospective situations reasonably foreseeable, it omitted the following risk factors: General Host's ability to effect a merger between General Host and Armour", that there were legal obstacles which might prevent General Host from merging with Armour in the event of opposition from non-Armour stockholders or members of Armour's board not under General Host's domination and control.

It is not a new issue.

THE COURT: He has answered the question.

MR. McAMIS: I suppose it's an answer, your Honor, but it was the first time I ever heard that there was an issue in the case that we should have put a sticker on the prospectus saying something more about the Greyhould exchange offer.

Also, with specific reference to the issue

denominated M in your statement of issues, or the plaintiff's statement of issues, which has to do with Host's statement of book values pro forma in the prospectus, I would like to know whether that is in or out of the case. It is my understanding it was clearly out, but I would question Mr. Glynn, perhaps, and for that reason I need to know whether it is in or out.

MR. WEISS: I will withdraw that as an issue, your Honor.

MR. GOULD: Just one second. Let me understand it. After what happened this morning, is he now withdrawing as an issue the failure to disclose that we knew what the debentures were trading at in the open market?

THE COURT: I don't understand you at this point, Mr. Gould. Mr. Weiss responded to a question that was put to him by Mr. McAmis and said he was withdrawing that particular allegation. Are you objecting?

MR. GOULD: No, no.

THE COURT: Why do you have to make a speech about it?

MR. GOULD: I am not making a speech. I just want to know if I understand --

THE COURT: Well, I am sure you understand it. I give lawyers a good deal of leeway, but let's not overdo it.

A I have an undergraduate degree in accounting from Adelphi University. I am a Certified Public Accountant in the State of New York. Prior to joining General Host Company, for a period of approximately fourteen and a half years, I was employed by Price, Waterhouse & Company, independent public accountants.

Q In connection with your employment at Price, Waterhouse, did you have anything to do with General Host during that period?

A Yes. For approximately the last two years I was employed with Price, Waterhouse with a six-month lapse at the end of that, where I was not involved with General Host. I was employed as the manager in charge of the audit of the General Host Corporation.

Q And you left the employ of Price, Waterhouse to join General Host?

A With a one-week interval, yes.

Q Now, coming to the prospectus in this case, Mr. Glynn, what if any connection did you have with its preparation?

A I was, a controller of the company, responsible for all accounting and reporting by the company and, as such, was responsible for the preparation of the financial statements and other financial data that was included in the prospectus.

MP 13 Glynn -

He gave a specific answer, and it seems to me it should be allowed to rest there.

Do you want to re-open it? He may change his mind.

MR. GOULD: That is what I am afraid of.

THE COURT: You certainly encouraged him to.

MR. GOULD: I accept your honor's censure.

DIRECT EXAMINATION

BY MR. McAMIS:

Q Mr. Glynn, what is your employment?

A I am financial vice president of General Host Company

Q As such, are you the chief financial officer of the company?

A Yes, sir.

Q How long have you been with the General Host Corporation?

A Since September 24, 1968.

Q And in what position or capacity did you join the company at that time?

A I was originally hired as controller of the company.

Q And for what period of time did you remain controller.

A Until May of 1973, at which time I was appointed vice president of finance.

Q What is your educational background, Mr. Glynn, and what did you do professionally before you came to General Host?

Q Do you have a copy of the prospectus before you?

A Yes; I do.

Q Turning to the pro forma combined statement of income at page 14, were you involved in the preparation of that schedule?

A Yes; I was.

Q Did you supervise its preparation?

A Yes, I did.

Q Who assisted you?

A Generally my accounting department at General Host Corporation. It was subsequently reviewed by Price, Waterhouse & Company by their audit personnel and by their SEC department, their personnel within their firm.

Q Why was a pro forma combined statement of income included in the prospectus?

A Because it was required under the SEC administrative practice at the time.

Q And was this pro forma statement of income submitted to and considered by the SEC in connection with its review of the prospectus?

A Yes, in connection with the review of both the General Host proxy statement and in connection with the review of the prospectus, both.

Q The same pro forma statement appears in the proxy statement which has been previously identified; is that what you are saying?

A That is right.

Q Without going through these pro forma statements one by one, would your testimony be the same as to the reason for their inclusion in the prospectus of

January 30th?

A Yes.

Q Was any schedule of General Host's cash flow included in the prospectus?

A No.

Q Did you consider the propriety of inclusion of such a schedule?

A When you say the propriety, it was considered inasmuch as it was discussed with the Securities and Exchange Commission staff late in January of 1969, but at the time it was not common practice, customary practice to include such information in the prospectus and it was decided not to include it in because the SEC has had for many years an absolute prohibition against the inclusion of projections of any kind.

The cash--

Q You are saying projected cash flow?

A Projected earnings, projected cash flow, projections of any kind in any filings with them. The management decision making process at General Host was based upon cash flow projections for future years, the years in which we would have to meet our cash needs and since that was the information we were making our decision on it would have been inappropriate to include anything but that in

the prospectus and since we were prohibited from including projections, we concluded that it should not be done and it was concurred then by the staff of the Commission.

Q Was it also considered by Price, Waterhouse, that is, the propriety of inclusion or non-inclusion? I am just asking if you discussed it with Price, Waterhouse.

A I don't recall discussing it with Price, Waterhouse, although they were privy to all of the issues being considered at the time.

Q You say that the management decision was based on projected cash flow. Do I quote you correctly?

A Yes.

Q Would you please tell the Court what that term is used in distinction to? What other type of cash flow might be possible?

A Well, to simplify it, the attorneys for Armour & Company were pleading, I guess, in many areas that historical cash flow information should be included in the prospectus. It just happened that the historical cash flow figures that the Armour people put together we incorrectly computed and the net result of it was that we felt that it was inappropriate to put historical cash flow information in there.

Q Let's break that down. You say that Armour had incorrectly computed. Is that the reason you thought historical cash flows were inappropriate?

A No.

Q Assume, then, that Armour's computation of historic cash flow were absolutely correct. Would historic cash flow have then been proper to use in this respect in your opinion?

A Not in my opinion inasmuch as the cash flow projections that were devloped by the company were developed through a long tortuous process of the individual operations of the company developing their earnings projections for the coming years and with the best information that the management of the company had to make its decisions on, and to have had that information available and to have used that for our decision making and, on the other hand, to have put in historical information which in effect would be also projections, since it would purport to show that the historical pattern in 1968 would be repeated in 1969 and in the future, we felt was inappropriate.

Q Can you briefly explain the difference in what the historical figures were versus the projected cash flow figures? Can you describe that?

A When you say difference, do you mean in amount

or in--

Q In amount.

A The actual difference between the 1969 and the 1968 figures was quite negligible. It was a small difference.

THE COURT: What company are we talking about?

THE WITNESS: General Host Corporation, your Honor.

Q Let me show you Plaintiff's Exhibit 24 in evidence and I will ask you if you can identify it, if you are familiar with it.

A Yes, I am.

Q What is it?

A This is a cash flow projection for the years 1969 and 1970 that was prepared from the internal information which I previously described and this particular memorandum, if I recall properly, was prepared from information that had been derived internally sometime before but since it had become the subject of question I guess in the Armour suit, it was prepared and typed in an informal manner as shown here.

Q Take a look at Exhibit 1 to the document. That is a pro forma cash flow statement for General Host Corporation for 1969

When did that information become available to you?

A The information first became available in late November of 1968 at which time our operating divisions, the operating divisions of General Host Corporation submitted their five year plan, which the first year was our operating budget for the 1969 year.

Q Could you explain to the Court the first line on that Exhibit 1, "Profit before tax"? How was that arrived at?

A It was arrived at by taking the profit projections for each of our operating divisions.

Q This is profit projections for what period?

A For 1969.

Q And you are saying that that was available in late 1968?

A That is correct, late November.

Q All right.

A By taking these profit projections for 1969 and adding to that any corporate--and by corporate I mean our corporate office income, deducting the estimated interest expense for 1969--

Q Interest on what?

A On all debt of the company that had been

incurred up to the end, approximately the end of November, thereabouts.

Q And what figure do you arrive at?

A You arrive at the figure of profit before taxes of 5,493,000.

Q That, then, is the first line on this schedule. In order to complete the schedule, what must be done next?

A The reason this is called pro forma is these projections were made in order to enable the management of the company to determine whether or not they would have sufficient cash available to meet all of the company's requirements, and so we had to take our estimated profit for 1969 and add to that--I will go down line by line--add to it the Armour dividend that we would receive at the varying levels of ownership of Armour common stock, the first column, as you can see, being 51 per cent and 60 per cent, 80 per cent and 100 per cent, and the assumption here was this would be the additional dividend on the additional shares at the rate of $1.60 per share that Armour had been paying for sometime.

Q The historic Armour dividend, you did not project any age for Armour, either up or down?

A That is right, we used the historic figure, even though Armour's management had made some statements

to their shareholders in the recent past we historical rate.

Q Go on.

A The next line shows a deduction for interest which represents the interest expense on 7 per cent debentures that would be issued in order to achieve each of the indicated levels of ownership, plus the additional interest expense on the amount of the debt that would be drawn down on that three-bank loan.

There was another $6 million that would be expected to be drawn down.

Q Is that what the phrase additional loans means?

A Yes, plus the third item that was in there that was an additional amount of interest added on to reflect the refinancing of the 9.4 million dollar insurance company loan at a higher rate than the rate that the company was currently paying, which was 1 per cent over prime.

Q And that then results in a form of profit before tax?

A That is correct. That is the next line. Then we have the next line which is what the actual tax impact would be, and I don't recall exactly how the figure was computed. It has been some six years ago, but it

would result in a tax benefit of 700,000 to the company, which brings us down to what the pro forma net profit would be for the company at the varying levels of ownership after completion of the tender offer.

Now, to convert that profit figure to what in effect would be cash available to us we add back the depreciation and amortization, our non-cash charges. They are charges to income statement which do not represent the actual outflow of cash.

We then deducted the amount of the long term debt that was scheduled to be repaid in 1969 which brought us down to the cash flow available.

Q Does that long term debt include the insurance company loan?

A No, it did not.

Q Why not?

A Because we anticipated refinancing it in August of 1969 when it would become due if the offer-- if the tender offer were successful.

Q And the result, then, of those computations is cash flow available to the company?

A That is correct.

Q Now, at the time of the prospectus you had these cash flow figures available and had had them for

sometime, I gather?

A That is correct.

Just to clarify this, at every point in which the pro forma financial statements were prepared giving effect to the proposed offer which would have been sometime, I'd say, in early to the mid-part of December of 1968 we, because of the magnitude of the transaction we were considering, prepared cash flow statements so that we could assure management, Mr. Ashton and Mr. Pistell and the board that we would have sufficient cash available to meet all our obligations.

Q Including interest on the debentures Host was proposing to issue in the exchange offer?

A That is correct.

Q Did you discuss these figures with the staff of the Securities and Exchange Commission?

A Yes, sir, I did. We submitted these cash flow statements to the staff and discussed them with them.

Q What was the reason you submitted them to the staff?

A They requested them and it was my understanding, in fact I was told by the staff that it was as a result of Armour's attorneys raising the point or the question as to General Host's ability to meet its debt

service requirements.

Q And after that question was raised they requested such figures?

A That is correct.

Q Now, you say you discussed it with the staff. With whom, specifically?

A My recollection is with Mr. Beard, who was the staff accountant on it, and a Mr. McCart, who was, I believe, the staff attorney.

Q When was that?

A Sometime in the latter part of January of 1969. I don't recall the specific date.

Q Did the staff have these figures in hand before the registration statement was declared effective?

A Yes.

Q Did you believe at the time of the registration statement that Host could pay interest in the debentures it was proposing to issue?

A Yes.

Q What was the basis of your belief?

A These cash flow projections.

Q Was Host's ability to service its debt limited to its cash flow?

A No.

Q What other resources did Host have available for that purpose?

A Well, not trying to put it in order of preference, we had many other sources of cash available such as disposition of assets, both assets which were not currently being used in the business--the disposition of operating divisions, borrowing funds, and I think we still had, certainly would have tremendous borrowing capacity, it was our belief, as a majority owner of the company the size of Armour & Company, leasing transactions, as many companies particularly went in within a tight cash situation and have done the financing through leasing arrangements.

There were many, many available sources of cash.

Q Did you report any dollar figures at that time on what might be raised through these various methods, either sale and leaseback or sale of divisions, sale of assets?

A We had Laird & Company, who were investment bankers, make a detailed study of the operations of the company and place in effect a sales price which they felt was a reasonable parameter of the selling price which we could obtain for each one of our operations,

so in effect we knew what in reasonable parameters each of these operations was worth.

As to the leasing question, no. I would have to say that how much you could generate through the vehicle of leasing is pretty much the same as how much money you can borrow.

It depends on what rate you are willing to pay and whether or not you can find a lender who will give you money. But as to trying to determine what these amounts were in the aggregate, no, I don't recall whether we had any done or had any reason to do it.

Q At the date of the prospectus, did you believe that General Host would have to borrow money during 1969 or 1970?

A In 1969 only to the extent of refinancing the 9.4 million insurance company loan.

Q Did you consider whether or not it would be possible or feasible for General Host to borrow money in the event that became necessary?

A Yes, I thought it was--I had no reservations at all in my mind as to the ability to borrow the money we needed.

I didn't quite finish the previous question. As I said, in 1969 we knew we would have to refinance the

9.4 million insurance company loan. In 1970 our cash flow projections indicated that we had no need to borrow any money in that year.

MR. McAMIS: Your witness.

THE COURT: Does any defense counsel want to question the witness before plaintiff does?

MR. DUFF: I do not, your Honor.

THE COURT: Mr. Gould?

MR. GOULD: I have no questions.

MR. BROWN: No questions.

THE COURT: Mr. Weiss.

CROSS EXAMINATION

BY MR. WEISS:

Q Mr. Glynn, on the cash flow projection dated January 30, 1969 are capital expenses included therein?

A Is your question has there been a deduction for capital expenditures on this schedule?

Q Anticipated capital expenditures.

A No, sir, there is none on here.

Q Had General Host spent moneys in 1967 and 1968 on capital expenditures?

A Is your question had they spent it?

Q Yes.

A Yes, they had.

Q Do you know in what amounts?

A Not offhand, no, I don't.

Q You testified to certain conversations with the Securities and Exchange Commission. Did you participate in those conversations?

A I guess you would have to check. Isn't that what I said?

Q I am asking you, did you participate in all of the conversations to which you made reference?

A Yes.

Q Did the SEC staff recommend at any time that you make any comment in the prospectus concerning the manner in which you were anticipating the payment of your future debt?

A I'm sorry, I don't really understand the question.

Q Did any staff member of the SEC recommend to General Host that it include a disclosure concerning the manner in which it would have to pay its debt in the future, the manner in which it planned to pay its debt in the future?

A No.

Q Did the company make a recommendation to the SEC that it include such a statement?

A I'm having trouble following it.

Q How did the question of cash flow come up in the discussion?

A My understanding, as related to me by a member of the staff of the SEC, was that the--

Q Excuse me. Let's just get this straight. When was this related to you?

A The time? In the latter part of January of 1969.

Q In what context? Was it a meeting that you had with them?

A I believe it was, yes.

Q Down in Washington?

A In Washington.

Q Okay, continue.

A I'm trying to recall where you interrupted me. Could you read back where I was interrupted?

(Record read.)

A --attorneys for Armour & Company had provided the SEC with a memorandum of points that they felt rendered the General Host Corporation prospectus misleading and that the lack of cash flow disclosure of some sort was one of these points that they had raised, and the SEC staff was inquiring into the question. That is the context

in which it arose.

Q What question was posed to you?

A The question, if I recall, was did the company anticipate the problem in meeting their cash needs in the immediate future.

Q Who posed this question; who was this man?

A It was either Mr. Beard or Mr. McCart. I don't recall. We had many meetings and there were many discussions and I'm afraid I don't have quite that good a memory that I can remember six and a half years ago or seven years ago what took place.

Q Was this the only conversation concerning the cash flow that you had with the Commission?

A It is the only one that I recall.

Q Do you remember the date?

A No, I don't recall the exact date.

Q Was it before or after the final amendment number 2 was filed?

A When was amendment number 2 filed?

Q On January 29, 1969.

A I believe it was before.

Q How long before; do you recall?

A No, I don't.

Q Was it within a week before?

A In that general vicinity. I'd say yes.

Q Now, what did he say and what did you say to him or whoever you spoke to? Was it more than one? Were there more than one members of the staff of the Commission there?

A Mr. Weiss, I think I have told you all I can recall.

Q Do you recall whether there was more than one person from the staff there?

A No. I told you I don't recall the specific meeting in which the discussion took place. I met with Mr. Beard and Mr. McCart and some of our attorneys on numerous occasions over approximately a six week period and I recall that was sometime in the latter part of January, but I don't recall who was present and I don't recall the specifics of the discussion.

Q Was there any discussion of the possiblity of including in the prospectus a statement that using historical figures alone the cash flow to meet the debt service was inadequate?

A I don't recall such a discussion. If the suggestion had been made I think I probably would have objected to it on the grounds of my earlier statement.

THE COURT: Your earlier statement as to what?

THE WITNESS: That the use of the historical figures as a basis for the determination of what the future cash flow was going to be was in effect a projection and if we were going to use a projection that we should use the information, the best information available to the management of the company, and that was the cash flow statements that we prepared internally.

Q You mean the projections?

A That is correct.

Q Did the staff members that you recall speaking to suggest the possibility of including the cash flow?

A I don't recall him doing so.

Q Did he say you couldn't?

A I don't recall.

Q Did you argue against the inclusion of the historical cash flow?

MR. GOULD: The man said he doesn't remember that the suggestion of inclusion was made.

MR. WEISS: I am asking him whether he remembers he argued against a cash flow.

THE COURT: Was there any discussion of that subject between you and the members of the SEC staff?

THE WITNESS: As I best recall the discussion that took place, Armour had made a charge that based on

the historical pro forma profit figures in the prospectus they have computed a negative cash flow, which means you can't meet your debt service requirements.

The first thing we did was to point out that Armour's computations were materially incorrect. That was the first thing. The second thing was that we had based our decision on this--on internal projections as to earnings and to cash flow which would show that we had adequate cash to meet all of our requirements, and that was the information that I thought was pertinent.

I don't recall the SEC asking us to put anything in and I don't believe it did, and the upshot of it was that nothing was put in there because the SEC was satisfied as far as the company was concerned that it felt confident at least that we could meet our debt service requirements.

Q Is it your testimony that the conversation had nothing to do with what should be included or not included in the prospectus but rather it was inquiry as to you anticipating paying the debt service in the future?

A No. The inquiry was one of whether or not there should be something in the prospectus and if we had internal cash flows, which we were relying on that showed a negative cash flow, I presume the SEC would have insisted

on some form of disclosure.

B4 Q So you are saying that if this internal cash flow that appears on Exhibit 24 showed a negative figure, that the SEC would have insisted on the disclosure; is that correct?

A No, I said I assume that is what they would have done.

Q Was there any discussion about the exclusion from this cash flow chart of the moneys that might be paid for capital expenditures in the future?

A I don't recall any discussion with the SEC.

Q And was there any discussion in connection with the cash flow chart of the $9.4 million obligation that was due in August of 1969?

A I don't recall anything specific being in connection with the cash flow. I recall a discussion of its treatment at some point.

Q So that at this meeting that you are talking about those two items were not discussed and you didn't bring them to the attention of the Commission?

A No, that is not what I said. I said I don't recall.

Q Do you recall bringing them to the attention of the Commission at that meeting?

A We discussed the cash flow schedules as well as the schedules that Armour had prepared.

THE COURT: When you say you discussed the cash flow schedules at the meeting, are you referring to Exhibit 24?

THE WITNESS: Yes, sir.

THE COURT: You had it with you at the time?

THE WITNESS: We submitted them to the SEC.

THE COURT: They were submitted to the SEC?

THE WITNESS: They were submitted to the SEC as the cash flow statements that Armour had prepared, which I said earlier were materially incorrect, had deducted capital expenditures and assumed rate of capital expenditure and also had deducted debt repayments which were erroneous, so I would say that the SEC had ample opportunity to weigh the two against one another and if they saw a problem with them could have asked the question, but I don't recall specifically discussing those points.

THE COURT: Part of the SEC inquiry, as I understand it, was based on Armour & Company's charge that General Host would not be able to meet the debt service?

THE WITNESS: That is correct.

THE COURT: Particularly in view of the new issue, the 7 per cent issue of $347 million?

THE WITNESS: That is correct.

THE COURT: As well as other debts?

THE WITNESS: That is correct.

Q Mr. Glynn, are you familiar with the phrase interest coverage?

A I have heard it used before, yes.

Q Do you know what it is, what it means?

A I think what you are alluding to is the ratio that is used by some rating bureaus to aid establishing the quality of debt securities--is that what you are referring to?

Q Yes.

A I'm familiar with it, yes.

Q Is that an important formula in evaluating the potential market value of a debenture?

A I'm not sure I'm qualified to tell you that it is an important statistic to be used in evaluating a debenture.

MP Glynn - cross

Q You spent how many years with Price, Waterhouse?

A Fourteen and a half years.

Q And did you work on the audit staff?

A For approximately nine or ten of those years.

A Is it your experience that most companies that you have come across prepare budgets and projections for the future?

A I would say I have yet to come across that well managed a company that doesn't.

Q And isn't it true that these budgets and forecasts are usually targets to which the employees are supposed to aim inthe conduct of their affairs in the period covered by the forecast?

A I would certainly not restrict a definition of a budget to that, no.

Q How were budgets prepared by General Host in the past?

A What do you mean, in the past?

Q Prior to the one on Exhibit 24, January 30, 1969.

MR. GOULD: I object to that, your Honor. It is not a budget.

Q A forecast.

MR. GOULD: It is not a forecast. It's just what it is.

Q Well, the profit figure is in that cash flow?

A Yes. As I told you earlier, I joined General Host in September of 1968, but my recollection is that prior to joining them that they did have budgets prepared on a regular annual basis.

Q And did you ever go back and check to see whether or not the company met its previous budgeted forecasts?

A Yes; I did that for 1968, as a matter of fact.

Q In '68 they prepared a 1969 forecast?

A In 1967 they had prepared a 1968 forecast.

Q And did it come on target?

A It exceeded it.

Q What exceeded what?

A The actual results for the year exceeded the budgeted results.

MR. WEISS: All right. Thank you.

THE COURT: Any other questions of this witness?

MR. McAMIS: I don't have any redirect, your Honor.

MR. GOULD: I have nothing.

MR. DUFF: I have nothing.

THE COURT: All right.

(Witness excused.)

THE COURT: All right. Call the next witness.

MR. McAMIS: I am out of witnesses, your Honor.

MP 2[a]

I expect to have one tomorrow morning.

THE COURT: All right.

(Discussion off the record.)

(Adjourned to April 17, 1975, at 9:30 a.m.)

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ALAN L. SPIELMAN

V. 73 CIV 573 EW

GENERAL HOST CORPORATION, et al

April 17, 1975
9:30 a.m.

oOo

(Trial continued.)

MR. McAMIS: Your Honor, I have a witness scheduled who is arriving on the train, and he has not yet come into the courtroom, and in that circumstance I would like to put a few more documents into evidence.

The documents that I wish to refer to this morning, your Honor, are as follows--and first I would like to take care of an omission that I made yesterday in reading into the record the documents that have been admitted, that is, a description of the documents that have been admitted as A-42, which was the record in the 1969 proceeding before your Honor, and just to complete the record, I will mention those documents. They consist of A-42-A, the complaint in the Armour and McClure Kelly case against General Host.

A-42-B is the transcript of February 5, 1969

of the preliminary injunction proceeding before your Honor.

A-42-C is the Court's opinion.

A-42-D is the affidavit of Mr. Glynn in this proceeding.

A-42-E is the Ashton deposition, which was admitted into evidence.

A-42-F is the Ashton exhibits to that deposition.

A-42-G is the Glynn examination before trial.

A-42-H is the Filene and McDowell depositions.

A-42-I is the deposition of Mr. Shapiro in that proceeding.

Now, the additional documents which I propose to offer this morning, your Honor, are of a type similar to those offered yesterday, respecting publicity and communications from Armour and Greyhound and the publicity surrounding the competing offers, and in that connection I will offer Exhibit A-62, which is an article from the Wall Street Journal of February 7, 1969.

A-63 is the letter dated February 10, 1969, from Greyhound to Armour stockholders.

A-64 is a supplemental proxy statement from Armour to its stockholders, dated February 10, 1969.

A-65 is an advertisement dated February 10, 1969, prepared by Armour, and A-68 is an article from the Wall Street Journal of February 11, 1969, concerning Greyhound's extension of its tender offer and the increase in the offer from $70 to $72 per share.

A-68 is a letter dated February 13, 1969, from Greyhound to Armour stockholders.

I move the admission of those documents.

MR. WEISS: No objection.

XXX (Defendants' Exhibits A-42-A through A-42-I, A-6 through A-65, A-67 and A-68 for identification were received in evidence.)

MR. McAMIS: Your Honor--

THE COURT: May I look at the exhibits, now that they are received in evidence?

MR. McAMIS: Yes, your Honor.

THE COURT: Now, this is the deposition of Mr. Ashton in the Armour and Kelly case against General Host.

MR. McAMIS: Yes, your Honor, and the same is true with respect to the other depositions.

THE COURT: Just a moment, please.

I assume you offer these in evidence because they have some probative value. Just give me an opportunity

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to see what they are, won't you?

MR. McAMIS: I am sorry, your Honor. Of course.

(Pause.)

MR. WEISS: Your Honor, I am under the impression from my discussion with Mr. McAmis that he is not offering this exhibit for the truth of the statements contained therein.

Is that correct?

MR. McAMIS: Correct,your Honor. Only for the fact--rather, only to complete the record, to indicate what was before the Court at the time of the preliminary injunction application.

THE COURT: Now, Exhibit A-65 is a letter to Armour stockholders by Armour & Company. I am looking for the date. I see it here. February 10th.

MR. McAMIS: I believe so. In fact, your Honor, I believe I am correct in saying that A-63 and A-65 are two different forms of the same thing. One is the letter and the other is the advertisement that appeared in the papers that day, the letter in advertisement form.

THE COURT: Well, bearing directly on the issues in this case--at least it does appear that way--there are two items. One is that "General Host will simply not generate enough cash to meet is requirements

unless it can merge with Armour."

Then, after other references: "It appears highly unlikely that General Host can acquire the 80 per cent necessary under the Internal Revenue Code for the consideration of the Armour earnings for tax purposes, in view of the fact that more than 20 per cent of the outstanding shares have been tendered to or acquired by Greyhound." And so forth.

MR. McAMIS: That is correct, your Honor.

THE COURT: That is merely an observation.

MR. McAMIS: I withdraw your Honor's attention to the fact that the langugage you first quoted follows a setting forth of the financials in General Host's own prospectus, which indicated a loss on the basis of pro forma figures.

MR. WEISS: Your Honor, there is another portion of that release sandwiched in between the two portions that you read, which states: "General Host states in its prospectus that it finds it desirable upon consummation of the exchange"--

THE COURT: If I may interrupt for a second, there was something I omitted. I am aware of it.

MR. McAMIS: Your Honor, it appears that my earlier statement on the record was in error as to the

source of the financial table. The footnote contains no indication that the financial table did come from the General Host prospectus, and, indeed, I see that it is not a statement of earnings on a per-share basis but a reported cash deficit.

THE COURT: All right.

Proceed, please.

MR. McAMIS: Your Honor, I have remaining documents to introduce, and that will conclude the documents on our direct case.

The first document is designated A-15(1), which is General Host's announcement of its exchange offer dated December 23rd, and Mr. Ashton had reference to that document.

The second is A-16, which is an article from the Wall Street Journal on December 24th reporting that announcement.

B2 The third is an article numbered A-20 from the Wall Street Journal of December 31, 1968, which I am putting in to indicate the nature and extent of Armour's criticisms of the offer. Even at that early date, Mr. Prince is quoted there as saying that "The offer of General Host is meaningless balderdash."

Finally, document designated A-49, which was

the dealer-manager agreement between Host and Allen & Co., Inc.

I offer those.

MR. WEISS: No objection.

(Defendants' Exhibits A-15(1), A-16 and A-20 were received in evidence.)

MR. McAMIS: I call Mr. Elgart, your Honor.

S T E V E N E L G A R T, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McAMIS:

Q Mr. Elgart, please state your present employment.

A I am vice president of Chase Econometrics Association, a forecasting subsidiary associated with the Chase Manhattan Bank.

Q How long have you held that position?

A Four years.

Q Are you an economist?

A Yes.

Q Will you discuss your economic experience prior to joining Chase Econometrics?

A I made forecasts and worked with the Wharton

model and the Friend model, at the Wharton School of the University of Pennsylvania.

I was consultant to a number of major corporations. I did some work for agencies of the United States Government, and I worked with the Econometrics model that is used at Yale University.

I also did some work for the Treasury Department on the effects of credit rationing on industry investments.

Q When did you do that work on credit rationing?

A During 1968 and '69.

Q What is credit rationing?

A Credit rationing is usually referred to as the non-price allocation of credit situation that occurs when credit may be tighter than is indicated by movements in interest rates.

For example, during some of the last three credit crunches, banks have allocated credit to their best and strongest customers, although that allocation was not performed merely through increases in the discount rate, in the prime rate.

Q Before I go further into the substance, could you briefly tell me the nature of your work at Chase Econometrics?

The majority of my work concerns consulting to our major corporate clients in the area of economic forecasting and financial forecasting.

Q Can you tell us who some of your major clients are?

A Well, rather than name them specifically, because we don't like to talk about our clients, let me say they include the four major automobile companies in the United States, 40 or 50 of the largest banks in the United States, including some of our parents' competitors, and a broad cross section of four or 500 industrials as well as a hundred foreign corporations and several agencies of the United States Government and eight or ten state and local governments.

Q At my request, have you made a study of the forecasts of availability of credit as such forecasts existed in January 1969?

A Yes; I have.

Q Could you tell us what you have done in connection with that study?

A Okay. In January of 1969, there were relatively few consistent forecasts being--

Q What do you mean by consistent forecasts?

A By "consistent" I mean two things: One, fore-

casts that were made of the total economy, using some relatively sophisticated statistical techniques rather than merely judgment, although certainly these models had better be used with judgment or they are not worth much.

The major one at that time in use was the Wharton model. The Wharton model at that time was providing economic forecasts to a large number of major corporations, including General Motors, and at that time Standard Oil of New Jersey and some of our larger banks here in New York City, and there were other forecasts that were also being made.

Wharton was the only large model that was in use at that time. I also--

Q Were you involved with that model at that time?

A Yes; I was.

Q Go ahead.

A I also examined the forecasts, expectations that were made by the Federal Reserve Board in their Open Market Policy Committee as reported in the minutes of their meeting of January 14, 1969, and the economic report of the President containing the report of the Council of Economic Advisers, which was released early in 1969.

Q Were there forecasts being made by private economists in January 1969?

A Yes--

Q That you have studied?

A Yes; there were.

Q Now, based on your study, can you tell the Court what the forecast of the availability of credit was as of January 1969?

A In general--of course, economists disagree among themselves frequently, but in general the feeling as reflected both in the Economic Board of the President and the Open Market Policy Committee and a cross section of the forecasts that were available was that money availability, credit availability would remain during 1969 at approximately the same condition that it was at during the latter half of 1968 and that following that, money would become much easier.

This is reflected in Wharton and in the other forecasts.

The reasons why they expected it to become easier was that they anticipated a slowing of the rate of economic growth.

Q Now, by "easier" do you mean easier in terms of availability or in terms of cost of money?

A Well, in general, they actually expected it to be easier both in availability and in cost, although marginally in terms of cost, a half percentage point perhaps in terms of short-term rates.

Q You indicated that there was some degree of disagreement. Was there any prediction or any study predicting any increase in credit rationing?

A There was only one economist, who was a private economist, who forecast the credit crunch but also anticipated that 1970 was going to be a boom year, so--it was a recession year.

Q What about your own forecast at that time?

A Our own forecast at Wharton at that time was that short-term money rates--we didn't forecast credit availability per se at Wharton, although I did some work in that area of forecasting that myself, but specifically the forecast of which I have a record here indicated that money rates would rise about three-quarters of a percentage point in terms of short-term rates, not very much in current terms, during the first half of 1969, and then it would fall beginning in the fourth quarter of 1969 and by the end of 1970 would be below the level it was at at the beginning of the year.

B3

Q And that was your forecast as of January of

that year?

A That's right.

Q January of 1969?

A That's correct.

MR. McAMIS: That is all.

DIRECT EXAMINATION

BY MR. GOULD:

Q Mr. Elgart, do I understand you correctly that the general consensus among professional economists in January of 1969 was that credit was going to be easier in terms of availability of funds and interest rates?

A Easier when, sir?

Q Easier to get money, and you wouldn't have to pay as much for it.

A It would be easier when?

Q It would be in the next six or eight months.

A No. That wasn't my testimony. My testimony was that during 1969 credit would remain approximately as tight as it was or as easy as it was, however you want to refer to it, at the time the prospectus was written, during December, say, December and January of 1969--

Q 1968?

A During December of 1968 and January of 1969. This is reflected in the minutes of the Federal Open Market

Policy Committee on January 14th, where their directive to the Federal Reserve Bank of New York was to retain the monetary policy that then existed and to--and they anticipated to accommodate some expansion in bank credit that would be needed.

Q In layman's terms, in other words, the period January 1969 was a time when there was no great concern about availability of money and interest rates; is that correct?

MR WEISS: Objection.

THE COURT: Overruled.

(To the witness) You may answer.

A Well, using the index of credit rationing, which is used today but which at that time was very new and which I helped develop the use of, although it was originally developed at MIT, the fouth quarter of '68 had the index with--well, it's normalized, but let's say with credit somewhat tighter than it had been during the period 1954 through 1970, but as compared with, say, the first quarter of 1970, a year later, credit became about four times as difficult to get.

So compared with the credit crunch period, credit was relatively easy.

Historically, this was a period of what we

call easy money.

A It wasn't easy money historically, but it wasn't particularly tight money.

MR. GOULD: Thank you very much.

XXX CROSS EXAMINATION

BY MR. WEISS:

Q Mr. Elgart, you are comparing the January 1969 period to the subsequent period--

A Yes.

Q --when you speak in terms of its comparative easiness or difficulty; is that correct?

A Yes.

Q But isn't it true that that period was comparatively difficult as compared to the period immediately preceding it?

A No. Immediately preceding that--if you go earlier, to go to '66, '67, during which we had the prior credit crunch and credit wasn't particularly available during that period--if we take a look at, say, the fourth quarter--these are quarterly data, unfortunately; the data are not available on a monthly basis for this index--you were at approximately four-tenths of a standard deviation, so you were saying that credit was about 20 per cent tighter than it had been during the entire period from

1954 to 1970 on average, so it was slightly tighter than it had been on average, but it was certainly not tighter than it had been during the tightest money period.

Q And hadn't the prime rates been on an upward trend in January '69?

A Certainly, short-term money costs were very high, and that was due to a high rate of inflation. But it should be made clear that there is not a direct link between the cost of money and its availability.

Q But the cost of money was on the ascendency?

A The cost of money was high. It remained--it had fallen during part of--well, we shouldn't take one month as being a trend, where we end up with extrapolative expectations.

But it was high relative to the historical period.

Q Now, you also testified, did you not, that you forecasted at that time a slow rate of economic growth?

A That's correct.

Q That means that you felt the economy wouldn't do as well; is that correct?

A That is correct. Just for the year 1969.

Q Is it also true, Mr. Elgart, that very frequently economic forecasts or money market forecasts or

interest rate forecasts don't turn out to be true?

A That's true, and that's one of the reasons why in, say, relying on a forecast in constructing a prospectus, I guess the best thing that one could do would be to anticipate the things--at the least one would anticipate that things would be more or less as they are at the present at the time it was written.

Q Or else, in other words, that they are unpredictable.

A Or that they are unpredictable, but certainly one wouldn't presume that they would get either better or worse.

Q And that the commercial world and the business world is oft times unstable and subject to all kinds of variations and conditions?

A Yes. That's why we make forecasts.

MR. WEISS: Thank you.

MR. McAMIS: No questions.

MR. DUFF: No questions.

(Witness excused.)

MR. McAMIS: I have nothing further, your Honor. Our clients rest.

MR. DUFF: Our clients rest.

MR. BROWN: Defendant Pistell rests.

MR. GOULD: I ask counsel for the plaintiff to stipulate that if Richard Carroon of Potter,Anderson & Carroon were to testify in this case, his testimony would be that he is a member of the Bar of the State of Delaware, that he was a member of the commission which drafted the New Business Corporation Law of Delaware in 1967, that he has examined the letter of opinion of Connelly, Bove & Lodge dated February 7, 1969, which is Exhibit A-61 in evidence here, that he concurred in the contents of the letter and that he would testify in substance that in his opinion the shareholders of a Delaware corporation retain the power to amend the bylaws even when a certificate of incorporation gives such power to the board of directors; and, accordingly, at any duly called meeting of shareholders of Armour & Company after February 14, 1969, General Host could have obtained an immediate majority of Armour's board by increasing the number of directors and filling the newly created directorships.

Will you so stipulate, Mr. Weiss?

MR. WEISS: No; I won't.

MR. GOULD: I understood yesterday that you would so stipulate.

MR. WEISS: You said you would tell me what

it was proposed that he would testify to, and I said I would consider it. I didn't say I would definitely stipulate to whatever you put into your proposal.

MR. GOULD: I am not suggesting we had a contract--

MR. WEISS: This is the first time that I am hearing what you want me to stipulate to. This is the first time I am hearing it.

MR. GOULD: I will be glad to give you the substance of what I said. Will you consider it and let me know at your earlier opportunity?

THE COURT: If there is any difficulty, I think if the witness is available--

MR. GOULD: He is in Baltimore, your Honor, and he is ill. That is the reason we arranged for the stipulation. He was taken ill and is unable to appear.

MR. WEISS: Your Honor, I am willing to consider this, but I need some time to do it.

THE COURT: How much time do you want, Mr. Weiss?

MR. WEISS: Ten or fifteen minutes.

THE COURT: We can take our mid-morning recess now.

MR. GOULD: If your Honor please, you will re-

call that I was due in the Circuit Court of Appeals, so can I be excused? I will go up there immediately, and I am the first case on.

THE COURT: Well, we will need you here as soon as possible. You are one of the lawyers in the case.

MR. GOULD: Your Honor, I am noted for my concise arguments, especially in view of my full preparation.

THE COURT: Are there any other witnesses?

MR. GOULD: No, your Honor. We are going to rest.

MR. WEISS: I would merely put in one document, your Honor, which is Defendants' Exhibit A-74, which is a loan agreement dated as of July 30, 1969, which is the one that Mr. Ashton testified to yesterday.

THE COURT: I thought one loan agreement came in this morning. All right. I take it there is no objection to that.

MR. McAMIS: I would like to consider it, your Honor.

THE COURT: All right. You consider the loan agreement, and Mr. Weiss can consider Mr. Gould's proposal.

MR. WEISS: Your Honor, is Mr. Gould going to

return before the case is over?

MR. GOULD: It is to be hoped.

MR. WEISS: Because I want to make a statement, and I held it back until the end of the trial.

THE COURT: Why don't you make the statement now?

MR. GOULD: I have ten or fifteen minutes, your Honor. That is no problem.

THE COURT: Go ahead and make the statement now.

MR. WEISS: Your Honor, I have restrained myself throughout the trial because I didn't want to demean the dignity of this Court or the counsel present, and I felt that the issues should not be bogged down by a personal contentiousness among counsel, but I feel that certain comments made by Mr. Gould in his opening remarks and on the motion to dismiss plaintiff's case yesterday are a personal attack upon the integrity of myself and my colleagues.

I do not want my silence to be taken to mean that we don't violently disagree with what Mr. Gould has said and that we haven't comported ourselves with the degree of honesty and integrity that befits a lawyer, and lest there be any mistake so that the implication to the

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contrary does not remain uncured, we did not bring this action because we had any other belief or that our client had any other belief but that there was a justisiable cause, and we still believe that, and we did not bring it to exact "settlement," because if we had, we wouldn't be here right now.

THE COURT: Mr. Weiss, I was going to interrupt you, but I decided that I would rather allow you to finish the statement, because I observed that you resented the statement very much that was made.

I think you ought to know, as far as this Court is concerned, that extreme statements made by counsel during the course of a trial which have no bearing or relevance on the issues are completely disregarded by the Court.

I do not pay the slightest attention to them, and I would say that anything that is presented before this Court that in any way or any respect suggests any improper conduct on your part or on the part of your associates, even though sometimes during the trial I think you should have understood that it is merely the exuberance or eloquence of counsel, I have discounted it a hundred per cent.

MR. GOULD: Your Honor, I deeply regret that Mr. Weiss interpreted it that way.

THE COURT: Well, you repeated it several times in rather extreme rhetoric. I think you were trying to cast it in general terms, but, after 1, Mr. Weiss was sitting in this case, and I could understand his taking umbrage as to what you said.

MR. GOULD: Let me explain it in terms really of apology to Mr. Weiss and the Court. I think your Honor knows that among those lawyers who have specialized at least to some degree in the defense of stockholder litigation, I have often expressed my deep conviction that there is no more salutary force at work in our system than the stockholders' suits or the threat of litigation against the people who run major corporations.

How often I myself have invoked the threat of stockholder litigation in order to convince directors and managers of corporations that they should do the right thing, I honestly can't recall.

I have the highest respect for those lawyers who specialize in that type of work, and I have the highest regard for Mr. Weiss as a member of that group. He knows that, and I have manifested very often in conversation with him my respect for him and my respect for his integrity.

Nevertheless, I respectfully suggest to the

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Court that in this field as in others there are excesses. There are points when good forces, good influences go beyond what I would call the critical point, and all I intended to convey to the Court was that I think this case--I don't think there is anything underhanded or sinister about it--I think this case represents an example of where people in good faith have gone beyond what I think is the critical point.

Now, what do I mean by the critical point? Every document submitted to the public is imperfect in one respect or another. I have never seen a perfect proxy statement or registration statement, and whether the imperfections require litigation as serious as this is a matter of judgment, and all I was trying to do is express to the Court that in my opinion in this particular case the facts did not require the exercise of judgment. If there was any other implication in it, I withdraw it and apologize for it and renew my affirmations of regard for counsel.

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THE COURT: Does that clear the atmosphere?

Mr. Weiss, I think you should accept Mr. Gould's forthright statement. I know both from remarks passed by you in this case and from your appearances before me in other matters you have a great capacity to discount utterly irrelevant comments by counsel, particularly when they border on the personal.

You can be sure that the case will be decided on the record and the merits of the case in accordance with my understanding of the tax and the law.

MR. WEISS: I never had any doubt of that, your Honor.

THE COURT: You may consider the request made by Mr. Gould of you with respect to a stipulation as to what a witness would testify who isn't present, and Mr. McAnis will consider whether or not he will consent to the offer of evidence on your part.

I suppose I ought to wait Mr. Gould's convenience. How long do you think you will be now, Mr. Gould?

MR. GOULD: We will probably be finished by 11:15.

THE COURT: All right, 11:15.

(Recess until 11:15 a.m.)

THE COURT: All right. Proceed, gentlemen.

MR. WEISS: Your Honor, apparently we cannot get any agreement on either of these items, so I would like to make my offer of proof first and then see what they have to say about it, if your Honor please.

MR. GOULD: Proof on what? I am sorry.

MR. WEISS: Well, I want to put in this loan agreement.

THE COURT: Go ahead.

MR. WEISS: Your Honor, this loan agreement is a loan agreement between General Host and Continental Illinois Bank, which was dated as of July 30, 1969, and in it is a requirement that Greyhound Corporation--the loan agreement was to General Host--there is a provision that Greyhound Corporation stand by the loan agreement.

THE COURT: Is this July 30, 1969?

MR. WEISS: That's correct.

THE COURT: And who are the parties to the agreement?

MR. WEISS: General Host and Continental Illinois. It has to do with Mr. Ashton's testimony yesterday about his ability to get money, and he said, "We got money in August."

This is the August agreement--the August loan.

MR. McAMIS: It was July 30th.

MR. WEISS: Isn't this the one that he was talking about? Do we have to have a disagreement about that?

MR. McAMIS: Yes. I do disagree, your Honor, and I object to the receipt of this document. It is in the first place considerably subsequent in time to the events involved in this lawsuit and, secondly, there was no testimony elicited from Mr. Ashton on his direct with respect to any loans following the exchange offer, and if there was any testimony about the summer of 1969 it was during Mr. Weiss' cross examination.

So I object to the receipt of this document as independent evidence of anything relevant to this case.

MR. GOULD: I join in the objection, your Honor. First of all, on the basis of the date--this is July 30, 1969, not proximate to anything we are concerned with here.

Secondly, I don't think it has any probative value. It doesn't prove anything at all except that they made a particular kind of loan agreement in connection with a transaction which wasn't even in contemplation on February 14, 1969. Nobody could have dreamed that it could have taken this turn.

Thirdly, how could it be used against either Allen & Co., Inc. or Allen & Company? I can't say that it is anything but a kind of smoke screen.

MR. WEISS: All right, your Honor. If what the defendants are trying to say is that we are now trying a liability case and not damages, and we have to only prove whether there was a material omission in the prospectus and that's all, then on that basis I withdraw this offer.

MR. McAMIS: Your Honor, my objection was based, as I stated--

THE COURT: I don't understand you gentlemen. He has withdrawn the offer. What is the point of continuing? There isn't anything before the Court.

Now, Mr. Gould, if you want to bring that witness up, I will continue the case.

MR. GOULD: Can I just consider that for a moment with other counsel?

(Pause.)

MR. GOULD: No, sir. We will rest right now.

THE COURT: I take it all parties rest?

MR. WEISS: Yes, your Honor.

MR. GOULD: Yes, your Honor.

MR. McAMIS: Yes, your Honor.

Your Honor, at this time on behalf of the defendants I represent, I wish to renew the motion to dismiss made to your Honor yesterday and also move for judgment on behalf of the defendants whom we have represented in this action before you.

THE COURT: Decision is reserved.

MR. GOULD: I make the same motion on behalf of Allen & Co., Inc.

MR. SULLIVAN: I join in that motion on behalf of my clients.

MR. BROWN: I join in that on behalf of Mr. Pistell.

THE COURT: Decision is reserved on those motions.

Mr. Weiss, other than the letter which was written by Allen & Company, which seems to express an opinion as to whether or not the $9,400,000 loan could be renewed, what other evidence is there in the case as far as Allen & Company's participation is concerned?

MR. WEISS: Your Honor, the only other evidence we put in is the stipulated facts.

THE COURT: All right. The motion made on behalf of Allen & Company is granted.

MR. DUFF: Thank you, your Honor.

THE COURT: Now, I would like you to address yourself, Mr. Weiss, to this:

There was a motion made to strike the testimony of Mr. Ashton, on which I reserved decision, which you didn't respond to yesterday. Why shouldn't that motion be granted?

MR. WEISS: Did you say Mr. Ashton, your Honor? I am not sure what your Honor was referring to.

THE COURT: I think--was it Mr. Glynn or Mr. Ashton?

MR. McAMIS: Mr. Glynn and Mr. Day, your Honor, from their depositions.

THE COURT: I had it wrong, then.

All right. Why shouldn't their testimony be stricken?

MR. WEISS: Are you talking about the April 30th study?

THE COURT: Well, I will give you the exact point. It was subsequent to February 14th.

MR. WEISS: Yes. That's correct. The testimony was that he prepared a study in April which reflected a $50 million cash requirement to General Host to continue the battle for control until the end against Greyhound, and I think inquired as to whether the conditions that

existed in the company at the time he made that study were materially different from what they were at the time that the prospectus was prepared in any respect other than the completion of the exchange offer, and he said they were not.

So that I think it is relevant to show what the condition was in January of 1969, when they prepared projected cash flows as demonstrated on the January 30, 1969 cash flow memo.

THE COURT: Where is the precise testimony?

MR. WEISS: Well, there are two places. One is Mr. Glynn on pages 230 and 231 and 232, and it demonstrates that the report prepared in March or April was for the purpose of repaying the $9,400,000 that on the books as an obligation of the company in January or February, and I am putting it in to demonstrate that this indeed was an obligation that had to be repaid within a year, and it was not contained in the cash flow projection--

THE COURT: Which obligation are you referring to?

MR. WEISS: The $9.4 million.

THE COURT: Well, that is the one as to which there was testimony that they intended to refinance it.

MR. WEISS: This testimony states, "When it was

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required to pay the $9,400,000 debt to the insurance companies."

THE COURT: I will take it for whatever it is worth, and in taking it, I will say, as I explained previously, that my determination will be based solely on relevant material.

MR. McAMIS: I understood your Honor's ruling to apply to the testimony of Glynn.

THE COURT: Well, wasn't there testimony on the same subject by another witness, too?

MR. McAMIS: Mr. Day's testimony is what Mr. Weiss had reference to a moment ago, and on his deposition the portion--

B2 THE COURT: Now, let's not get into an extended argument. I have just ruled on this item. Now get down to the next item and tell me why you think it should be excluded, in the light of what I have just said.

MR. McAMIS: The only reference is on page 129, your Honor, and in view of your Honor's statement, I will withdraw the objection.

THE COURT: Now, gentlemen, what is your pleasure?

MR. WEISS: Your Honor, I would prefer to carefully analyze the record and present in writing our

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proposed findings and memorandum of law.

THE COURT: Defendants?

MR. GOULD: Maybe the best thing to do is to get up--I would call it a brief and proposed findings and review of the record.

MR. McAMIS: Your Honor, for myself I am prepared to go on the present record, but if other counsel are going to put in post-trial memoranda and the Court would regard it as helpful, I will do the same.

THE COURT: Well, I am going to ask counsel to confine themselves to the issues that have been narrowed since the start of the trial. There is no point wandering all over the lot again and getting into a great many areas as to which no proof is offered.

I think the issues are now fairly well defined, and basically if you refer to the item on page 9 of the prospectus, where Mr. Weiss spelled out in response to the Court's question what he thought should have been included, which he claims is an omission, that will be helpful.

Further to that, I would like defense counsel to direct themselves to the sentence beginning, "If no such merger or consolidation occurs," as to whether or not this is a misstatement of the effect if upon completion

of the exchange offer General Host were not in a position to increase Armour's dividend, whereas General Host could do so only after certain events occurred, such as getting the cooperation of Armour's directors or amending the bylaws to increase the number of directors of Armour--I take it, stated the way I stated it, the answer is that of course there were these other methods, suggesting that even though a board of directors may have been put in by a prior management that was hostile, there is no reason to assume that those directors would not carry out a fiduciary relationship by serving the stockholders' interest, no matter who the stockholders were, and now, of course, there is this other matter, where the opinion was expressed that the stockholders in effect, notwithstanding the certificate of incorporation, could set up a new directorship method of election. Is that right?

MR. McAMIS: Right.

THE COURT: Mr. Ashton did testify, but my recollection is that there was no testimony that any resolution was offered at that February meeting of Armour & Company with respect to amending the bylaws.

MR. WEISS: He said, your Honor, that he did--

THE COURT: Then they worked out where they elected the four directors, and then the president declared

the resolution out of order.

MR. McAMIS: That is correct. It was offered, your Honor.

THE COURT: Well, now, I am repeating, but I want you to confine yourself to what the issues are in the case.

Now, there is one other item that I would like plaintiff's counsel to direct himself to.

This has come up constantly in the case. The evidence does indicate that information bearing directly on the present contentions that you make as to omissions was received by the stockholders of Armour prior to February 14, 1969--certainly as set forth in the communications submitted by Armour & Company to its stockholders--and one does not have to rely on the public press in this case.

In addition to that, I think the litigation in this Court was referred to me, and certainly the capacity of the corporation to meet the debt service on the $347 million debenture issue and other debts was called to the attention of the Armour stockholders and in fact was highlighted. There cannot be any question about that. It started with the letters that went to the SEC from the lawyers representing Armour & Company. It continued by

means of direct communication to the Armour stockholders, and again it was highlighted by the proceeding or the action that took place before me.

What is the significance of the Armour stockholders having that information?

I am saying that this record permits a finding that they were in possession of the very information which you suggest should have been what you call red-lined or highlighted, as set forth in Paragraph 9 one way or another.

Do you follow me, Mr. Weiss?

MR. WEISS: Yes. Exactly, your Honor.

THE COURT: How much time did you gentlemen want?

MR. WEISS: Ten days is fine.

MR. GOULD: Would your Honor want us to exchange, or would you want Mr. Weiss to go first?

THE COURT: Well, I think what you ought to do is exchange, and I suppose you will each want--why don't you take a week to get out your exchange briefs and five days thereafter to serve any replies? With your main briefs I want you to submit, in the light of the record now, new proposed findings, and the opposing parties will set forth after each finding where in the record there is

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support for the requested finding.

Then, when you serve your reply briefs, you will also, with respect to the proposed findings that you disagree with, that is, the proposed findings of the other side, set forth why you disagree and where in the record there is a basis for your disagreement.

MR. GOULD: Would your Honor simply, instead of a week, make that a week from Monday?

THE COURT: Well, I have no objection to making it a week from Monday, because I will tell you in all candor that I have cases until June back to back, and I have other matters, and I think you will have to be patient as to when I can get to this.

How, if I can get to it between other matters or if a case should fold, I will try to.

MR. GOULD: A week from Monday, then?

THE COURT: All right. You all understand just what I want?

MR. WEISS: Yes, your Honor.

MR. GOULD: Yes, your Honor.

THE COURT: Very well. Good day, gentlemen.

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UNITED STATES DISITRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,

Plaintiff,

-against-

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN S. MANUS, CECIL MANUS and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

Civil Action
File No.
73 Civ. 573 (EW)

AMENDED COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff, whose surname was misspelled "SPEILMAN" in the original complaint, for his amended complaint alleges by his attorneys, MILBERG & WEISS, upon information and belief except that Paragraph 14 is alleged upon knowledge.

ALLEGATIONS COMMON TO ALL COUNTS

1. (a) The basis for jurisdiction of this Court is §27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78aa), ("Exchange Act"), and §22 of the Securities Act of 1933, as amended (15 U.S.C. §77b) ("Securities Act"), and arises under Sections 10(b) and 14(c) of the Exchange Act and §17(a) of the Securities Act, the Rules and Regulations promulgated thereunder, and principles of pendent jurisdiction.

(b) Plaintiff brings this action under FRCP Rule 23 on his own behalf and as representative of a class similarly

situated.

2. Defendant General Host Corporation ("General Host") is a New York corporation with its principal place of business in the Southern District of New York and at all times herein its common shares were traded on the New York Stock Exchange.

3. Defendant Richard C. Pistell ("Pistell") resides in the Southern District of New York, was Chairman of the Board of Directors of General Host from May 1965 through May 1970 and Chairman of the Board of Directors of Goldfield Corporation ("Goldfield"), a General Host affiliate, from July 1961 through December 31, 1969, holding other executive positions with Goldfield during the same period, and dominated and controlled Goldfield

4. Defendant Harris J. Ashton ("Ashton") resides in Greenwich, Connecticut, maintains a place for doing business within the Southern District of New York and from 1962 to at least the end of 1970 was a director of, from about December 1967 through June 1970 was also President of, and from about June 1970 was also both President and Chairman of the Board of Directors of, General Host.

5. Defendant Allen & Co., Inc. ("Allen Inc.") is a New York corporation with its principal place of business in the Southern District of New York, has been registered with the Securities and Exchange Commission ("SEC") as a broker-dealer, served as investment banker to General Host and as co-dealer-manager with respect to the General Host Exchange Offer for Armour securities.

6. Allen & Co. ("Allen Co.") is a partnership, registered in the State of New York, maintains its principal place

of business in the Southern District of New York and is and has been registered with the SEC as a broker-dealer during all relevant times mentioned herein.

7. Defendant Kleiner, Bell & Co. Inc., ("Kleiner Bell") is a Delaware corporation with its principal place of business in Beverly Hills, California, was registered with the SEC as broker-dealer during the relevant times mentioned herein and served as investment banker to General Host and as co-dealer-manager with Allen Inc. of the General Host Exchange Offer for Armour securities.

8. Defendant Seymour Lazar ("Lazar") resides and has a principal place of business in Los Angeles, California.

9. Defendant Eugene V. Klein ("Klein") resides in Beverly Hills, California, is Chairman of the Board of Directors and Chief Executive Officer of National General Corporation ("National General"); during all relevant times herein he served as a Director and Chairman of the Finance Committee of Great American Insurance Company ("Great American"), a New York corporation engaged in the fire and casualty insurance business and a subsidiary of National General, and was a participant in the K & S Investing Partnership, a California partnership.

10. Defendant Allen S. Manus ("Allen Manus") resides in Palm Beach, Florida.

11. Defendant Cecil Manus ("Cecil Manus") resides in the Southern District of New York and is the brother of Allen Manus.

12. At all times material hereto, the defendants Richard C. Pistell, Harris J. Ashton, C. Whitcomb Alden, Jr., Joseph P. Binns, William F. Downey, Weston E. Hamilton, William

P. Howe, Jr., J. Elroy McCaw, Edwin C. Donald and Leslie W. Scott were directors of General Host. In addition to Messrs. Pistell and Ashton, defendants Alden, Howe and McCaw were also directors of Goldfield.

13. Armour & Company ("Armour") is a Delaware corporation with its principal place of business in Chicago, Illinois. On or about January 27, 1969, Armour had approximately 6.1 million shares of common stock and $32,645,600 in principal amount of 4-1/2% convertible subordinated debentures outstanding and all of said securities were publicly traded. Armour was the second largest meat packer in the United States; for the year ending November 2, 1968 its sales were in excess of two billion dollars, and as at the same date it had a net worth of approximately $291,777,000, current assets of approximately $340,356,000 (with cash of $41,200,000) and a curent ratio of 3.53 to 1.

14. Plaintiff Alan L. Spielman resides in Philadelphia, Pennsylvania, and made purchases of Armour securities as follows:

100 shares	on February 3, 1969	at $70.00 per share,	total $ 7,046.00
100 "	" " 13, 1969	at $72.58 "	" " $ 7,308.76
		Grand Total:	$14,354.76

Pursuant to the General Host Exchange Offer, in an exchange for his aforesaid Armour shares, plaintiff received $12,000 of General Host's 7% subordinated debentures due February 1994, plus 500 warrants, each warrant to purchase one share of General Host's common stock at $40.00 until January 31, 1979. The General Host securities received by Mr. Spielman were thereafter sold at a loss of $6,102.68. In making his aforesaid purchases,plaintiff relied on the integrity of the market in

Armour and General Host securities and on the Prospectus described below.

CLASS ALLEGATIONS

15. Plaintiff is a proper representative of a class as defined by FRCP 23. The class consists of the following:

(a) Those persons or entities who held Armour securities, either common stock or convertible debentures, prior to July 29, 1968, and exchanged them for General Host debentures and warrants pursuant to an Exchange Offer alleged hereinbelow and did not accept the Greyhound Cash Tender Offer alleged below;

(b) Those persons or entities who purchased Armour securities, either common stock or convertible debentures, between July 29, 1968 and February 14, 1969, did not accept the Greyhound Cash Tender Offer, and exchanged them for General Host debentures and warrants issued pursuant to the said Exchange Offer,

(c) Those persons or entities who purchased Armour securities between July 29, 1968 and February 14, 1969 and held them without tendering them to either General Host or Greyhound,

and all of whom sustained damages when they later sold or disposed of their securities at lower prices, or continued to hold them at lower values. All of the said

class members are similarly situated to plaintiff, and plaintiff and the said class members all relied on the integrity of the market and the artificially maintained market prices of Armour securities and General Host common stock and/or on the consequent relative attractiveness of the General Host debentures and warrants to be issued pursuant to the Exchange Offer, in comparison with a competing cash tender offer by Greyhound Corporation, and/or on the Prospectus and other published material, all as more particularly alleged below.

16. The number of class members is at least 2,000.

17. Plaintiff is an adequate representative of the class because he sustained damages and has the same interests as all the members of the class; his claims are typical of the claims of the members of the class, and he and his counsel will fairly and adequately protect the interests of the class.

18. There are questions of law and fact common to the class, which predominate over any questions solely affecting individual members of the class. Among the questions of law and fact common to the class are (a) whether defendants concerted together, participated in, conspired to, or aided and abetted in the acquisition of control of Armour via an Exchange Offer and in connection therewith performed the acts and transactions complained of herein; (b) whether defendants artificially inflated the market price of General Host and Armour securities;

(c) whether defendants caused false or misleading information to be disseminated to plaintiff, members of the class and other members of the general public; (d) whether defendants caused or permitted false and misleading information to be included in a Prospectus dated January 30, 1969 containing the Exchange Offer by General Host for Armour's securities; (e) the duty owed by defendants to members of the class; (f) the resulting liabilities of defendants; (g) the measure of damages, and (h) the materiality and impact of defendants' acts upon the market place.

19. This class action is superior to other available methods for a fair and efficient adjudication of the controversy.

COUNT I

(Section 10(b) Exchange Act)

20. Paragraphs 1 through 19 are realleged and incorporated hereby by reference.

21. In or about July, 1968, defendants General Host, Pistell and Kleiner Bell learned that a block of Armour common stock was available for sale by Gulf & Western Industries, Inc. Thereafter, defendants General Host, Pistell, Ashton, Allen, Inc., Allen Co., Kleiner Bell, Lazar, Klein, Allen Manus and Cecil Manus concerted together to form and formed a partnership, syndicate or group to purchase Armour securities from Gulf & Western, and to acquire control of Armour, ("General Host Group").

22. Pursuant to the said purpose and common plan, General Host, acting through, and aided and abetted by defendants Pistell and Ashton, contracted to purchase 750,000 shares of Armour stock, which constituted approximately 12-1/2% of

said company's outstanding common stock as at August 12, 1968. A closing was conducted in August, 1968 with respect to 150,000 shares and in October 1968 with respect to 600,000 shares.

23. Prior to the last said closing, certain of the defendants who were part of the General Host Group, and certain entities or persons associated with or controlled by them, purchased the following securities in the following approximate amounts:

General Host common stock	-	19,300 shares
Armour common stock	-	29,400 shares
Armour 4-1/2% convertible debentures (Armour debentures)		$40,000 principal amount

24. The General Host Group, together with other persons and entities, then entered into a conspiracy and plan to purchase a controlling block of Armour securities pursuant to an Exchange Offer to the public of General Host securities for Armour securities, and, pursuant to said conspiracy and plan, intentionally, knowingly and wilfully, and using the mails and other instrumentalities of interstate commerce, used and employed devices, schemes, and artifices to defraud, made untrue statements of material facts, and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in acts, practices and courses of business which operated and tended to operate as a fraud and deceit upon holders of securities of Armour, and upon purchasers and sellers of Armour securities, by engaging in and effecting transactions, acts and omissions alleged below.

25. Pursuant to the said conspiracy and plan and prior to the issuance of the General Host Exchange Offer, at least the defendants General Host, Pistell and Ashton, concealed the activities of the General Host Group from the public and the SEC by failing to file timely reports and amendments thereto with the SEC reporting General Host's acquisition of more than 10% of the common stock of Armour, and when such report and required amendments thereto were filed, by failing to disclose their purpose to acquire control over Armour, the existence and identity of the General Host Group, and the identities of beneficial owners of certain notes of General Host used to finance the purchase of Gulf & Western's Armour shares, the changes in membership of the Group, the subsequent purchases of Armour shares, their continuing purchases of Armour shares and of General Host stock, the nature of their continuing transactions and activities in Armour and General Host stock, and the market therefor.

26. Pursuant to said conspiracy and plan, General Host's intention to make the Exchange Offer was announced on or about December 23, 1968 and a registration statement and prospectus filed with the SEC on or about December 30, 1968, became effective January 30, 1969 to expire February 14, 1969. Under said Exchange Offer, for each share of Armour common stock or principal amount of Armour 4-1/2% convertible subordinated debentures, required upon conversion to obtain one share of Armour common stock ($51.14 on January 30, 1969), the Armour owner was to receive $60 in principal amount of General Host 7% subordinated debentures due February 1994,

plus 2-1/2 warrants each giving the right to purchase one share of General Host stock at $40 until January 31, 1979 (all the said General Host securities hereinafter "General Host Securities Package"). The prospectus containing the Exchange Offer was disseminated by mail and other instrumentalities of commerce to the general public.

27. On January 27, 1969, Greyhound Corporation, through a subsidiary, announced a competing offer to purchase Armour common stock for cash ("Greyhound Cash Tender Offer"). The Greyhound Cash Tender Offer was in effect from January 27 through February 13, 1969 except that the price was changed from time to time as follows: $65 per share from January 27th through the early afternoon of January 30th; $70 per share from that point through February 9th; $72 per share from February 10th through February 13, 1969.

28. The announcement of the Greyhound Cash Tender Offer made it essential to the successful consummation of the General Host Group's plan and conspiracy that the General Host Exchange Offer and the General Host Securities Package be made to appear more attractive to the public, in and of itself, and in relation to the Greyhound Cash Tender Offer.

29. Pursuant to the said conspiracy and plan, the General Host Group engaged in the following illegal transactions:

(a) In January, 1969, Pistell caused the purchase of 3,300 shares of General Host through a nominee account, and caused Goldfield, of which he was also Chairman of the Board, to make an unlawful loan to him of the funds to

effect such nominee purchase, which was for his own account;

(b) Pistell and Ashton caused a joint venturer of Goldfield to purchase 7,200 General Host shares in January 1969 and guaranteed such joint venturer against loss.

(c) In January and February 1969, Pistell caused an individual ally of General Host to bid for, and purchase, 13,300 General Host shares at prices between $38-3/8 and $41 per share.

(d) In February 1969, when Allen, Inc. and Allen Co. learned that a certain mutual fund was liquidating 100,000 shares of General Host common stock, Allen Co. induced another fund to buy 28,100 shares of said block of shares through another broker-dealer on the New York Stock Exchange on February 11, 1969, without exacting the usual "block" discount from the then market price although there was thin trading volume on that day.

(e) Defendants Allen Manus and Cecil Manus purchased or induced the purchase of 13,000 shares of General Host stock on or about January 23, 1969.

(f) Defendants General Host, Pistell and other defendants entered into a campaign to promote the desirability of the purchase of shares of General Host to large institutional investors and other large investors, to artificially enhance the attractiveness of General Host securities as a speculation and/or investment, and to lull

existing shareholders into retaining their General Host securities. Said defendants participated in preparation of misleading research reports which, on the surface, appeared to be impartial and objective, and supplied material in interviews arranged by Allen, Inc. and Allen Co. with analysts and salesmen employed by a broker-dealer who published another misleadingly "impartial" and disinterested research report, and in other ways, publicized the attractiveness of General Host securities without disclosing their own roles.

30. The aforesaid illegal and clandestine transactions and activities alleged in Paragraph 29 were intended by the General Host Group to and did artificially raise or maintain the price of General Host shares by, among other things, restricting the floating supply of said shares in the market; creating an appearance of market activity which was in reality the result of defendants' activities in the generation of purchases which would not otherwise have been made or would have been made at lower prices and preventing the development of a free and true market for such shares by preventing large shareholders who were about to sell their stock from selling said stock in the open market and inducing them instead, to make negotiated sales to the General Host Group or to persons who were designated by said Group.

31. It was essential to the General Host Group's purpose to keep the General Host Exchange Offer attractive to the public, and to prevent members of the public who held

Armour securities or who had purchased them from tendering them to Greyhound, that the market price of Armour stock meet or exceed the Greyhound Cash Tender Offer prices. Pursuant to their said plan and conspiracy the General Host Group performed the following misleading acts and transactions to artificially inflate and maintain the price of Armour securities:

(a) At Kleiner Bell's instance defendant Klein, who controlled Great American, caused Great American to buy a 25,000 share block of Armour stock at $71 per share, $1.00 above the then price of the Greyhound Cash Tender Offer, and further caused such privately negotiated trade to be reflected on the transactions of a public exchange to publicize the excessive price;

(b) Defendant Kleiner Bell caused defendant Lazar to bid for and purchase 2,700 Armour shares at prices above the Greyhound prices at the time.

(c) On February 11 and 12, 1969 Kleiner Bell and Pistell knowing that Lazar did not have sufficient cash to make payment therefor, caused him to buy approximately 58,000 shares of Armour stock bid for by Kleiner Bell at a price above the competing tender offer. Pistell advised Lazar that Pistell would relieve him of the financial burden of said transaction, and said purchase was never paid for by Lazar, all being also in violation of margin regulations and other regulations with respect to the extension of credit to purchasers of securities.

(d) On or before February 13, 1969 when defendants Pistell, Allen, Inc. and Allen Co. learned that a block

of approximately 50,000 Armour shares was either being thrown on the market, or was to be made available for tender to Greyhound, or at least not tendered to General Host, said defendants arranged for the purchase of said block by an ally of General Host through another broker for cash to prevent the depressing effect said sales would have on the market for Armour securities or to avoid the possibility that said shares would not be tendered to General Host pursuant to its offer.

(e) On or about February 10, 1969, Lazar (who had no cash personally available to finance the purchase described in subparagraph (b) above), sent a telegram to an investment adviser to solicit the rejection of Greyhound's tender offer and offering to buy 170,000 Armour shares from two mutual funds managed by such adviser. On February 12th General Host sent a telegram to the same investment adviser soliciting the said mutual funds to revoke their tenders to Greyhound of 170,000 Armour shares. On or about the next day, General Host, Kleiner Bell and Allen, Inc. caused an advertisement to be published in The Wall Street Journal and other newspapers, indicating that deposits with Greyhound, pursuant to the Greyhound Cash Tender Offer, could be revoked at any time before February 18, 1969. The aforesaid activities were unlawful attempts to defeat the Greyhound Cash Tender Offer.

(f) On February 11, 1969 the defendants General Host, Allen, Inc., Allen Co., Kleiner Bell, Allen Manus, Cecil

Manus and Pistell also induced large holders of Armour's common stock, to tender Armour shares by agreeing to purchase General Host warrants to be received by such large holders in exchange for their Armour shares, while denying such preferential treatment to other holders of Armour shares.

(g) Allen, Inc., and Allen Co. caused Lazar to bid for, and purchase 50,600 shares held by an insurance company and its affiliated registered investment companies which said owners had decided not to tender to General Host, by offering the sellers cash for the Armour shares with an ostensible purchase by Lazar at prices above the then Greyhound cash tender price, and then arranged for Lazar to be relieved of the financial burden by finding another buyer, and in fact, although the said shares had been "short-tendered" by Lazar and Weeden & Co. Inc., the original broker, General Host permitted Weeden to rescind on behalf of itself and Lazar.

(h) Defendants Allen, Inc., Kleiner Bell and Lazar made cash bids on behalf of Lazar on or about February 7, 1969 and February 10, 1969 for 170,000 Armour shares held by two investment companies.

(i) The arrangments to purchase warrants described in subparagraph (f) hereinabove, the cash payment for 50,000 shares described in subparagraph (d) hereinabove, and the cash bids for 170,000 shares described in subparagraph (h) hereinabove, were preferential payments and benefits not made or offered to other Armour shareholders and not publicly

disclosed, omitted from the Exchange Offer Prospectus and not disclosed in any post-effective amendment to the Registration Statement or Prospectus.

(j) Defendants General Host, Allen, Inc. and Kleiner Bell caused false and misleading news and press releases and advertisements to be publicly disseminated on or about February 11, 1969 which misstated the progress of the General Host Exchange Offer with respect to the percentage and amount of Armour securities tendered up to that time, for the purpose of lending a false appearance of success to their attempt to gain control of Armour.

32. The Registration Statement and Prospectus containing the Exchange Offer filed and disseminated by General Host pursuant to the said plan and conspiracy was false and misleading and omitted material facts in that:

(a) with respect to past activities:

(1) it failed to disclose to the public the above alleged pattern of defendants' manipulation, inflation and retardation of the normal processes of the market in Armour and General Host securities;

(2) it failed to disclose defendants' above alleged interference and tampering with the integrity and freedom of the market in General Host and Armour Securities;

(3) it omitted disclosure of unlawful preferential treatment afforded large holders of Armour securities;

(4) it failed to disclose the other unlawful activities of defendants alleged in this Count I.

(b) With respect to prospective situations reasonably foreseeable, it omitted at least the following risk factors:

(1) General Host's ability to effect a merger between General Host and Armour following the Exchange Offer;

(2) General Host's compelling necessity to obtain the use of assets or credit of Armour, or to obtain other assets, in order to meet its obligations under the debentures to be issued to Armour securities holders pursuant to the Exchange Offer;

(3) the possibility that if General Host would be unable to merge with Armour, it would not have the ability to pay the interest and other charges on the debentures to be issued by it in the exchange;

(4) the various legal obstacles which might prevent or impede General Host from merging with Armour in the event of opposition from non-tendering Armour stockholders or members of the Armour board not under General Host's domination and control; and

(5) the need to sell at a sacrifice the General Host position in Armour stock if unable to finance interest charges or other payments on the debentures issued to Armour securities holders. In fact, General Host

ultimately sold out its Armour securities to Greyhound Corporation at a $50,000,000 loss.

33. The defendants also further misled the public and the news media by filing reports with the SEC which failed to disclose the above alleged manipulative transactions, by failing to disclose to the SEC their aforesaid purchases and ownership of Armour and General Host securities and by failing to disclose to the SEC the aforesaid unlawful guarantees and financing of the aforesaid unlawful purchases of Armour and General Host securities.

34. Each of the defendants who comprised the General Host Group effected the transactions, acts and omissions alleged herein, knowing and wilfully intending that the said transactions, acts and omissions would affect the integrity of the market, and artificially raise and maintain the market prices of General Host securities, and would induce members of the public to purchase General Host securities, to continue to hold Armour securities, to purchase Armour securities, and to tender the said Armour securities to General Host instead of to Greyhound, and each of the said defendants knew, or should have known, that the Registration Statement, Prospectus, the filings, the newspaper reports, and other public statements were false and misleading, contained material omissions, and constituted acts, practices or courses of conduct which were illegal and designed to defraud and deceive and those defendants who were not members of the General Host Group, in effecting or permitting the corporate actions by General Host as alleged above, knew or should have known the same or recklessly disregarded whether or not the Registration Statement, Prospectus

and aforesaid filings, reports and statements were false and misleading and designed to defraud.

35. The General Host Group conspired and participated in and aided and abetted each other in performing the transactions and acts and omissions herein alleged. Those individual defendants, other than those named as members of the General Host Group, participated in, aided or abetted or, as directors of General Host, were aware of all or parts of the aforesaid transactions, acts and omissions of the General Host Group, and participated in corporate acts of General Host to effect the same, or with knowledge that the said acts, transactions and omissions were being performed, failed to exercise their obligations and rights as directors of General Host to prevent the said corporate action.

36. The Exchange Offer was successful to the extent that General Host received sufficient shares and debentures of Armour under the Exchange Offer to give it approximately 50% of the common shares directly or through conversion of Armour debentures.

37. In order to maintain the price of General Host securities after the expiration of the Exchange Offer and apparently pursuant to commitments made in the course of said conspiracy and plan and pursuant to said conspiracy and plan, when Kleiner Bell learned on or about February 17, 1969 that a registered investment company had commenced a liquidation of its 70,000 share position in General Host, and had sold 7,300 of said shares on that date, and that the market in General Host had declined and to prevent a further decline in said market for General Host stock and a consequent decline

in the market for the General Host Securities Package which had been issued to many of Kleiner Bell's clients, Kleiner Bell arranged that 60,100 of the said block of shares be purchased as follows: 45,000 shares by Great American through the direction of the defendant Klein; 10,000 shares for Allen Co.; 1,800 shares for Lazar; 1,500 shares for Union Bank of Switzerland, which had become a member of the General Host Group; 1,800 shares for another client of Kleiner Bell, and defendants Manus purchased or arranged for the purchase of 11,000 of General Host shares between February 28, 1969 and March 10, 1969.

38. Plaintiff and other members of the class, in ignorance of the falsity of the reports, statements and documents and the illegal activities described above, relied on the integrity of the market prices of Armour securities and General Host shares and/or the Prospectus, either in holding or purchasing Armour securities and tendering their Armour securities to General Host, or continuing to hold purchased Armour securities without tendering them.

39. Plaintiff and members of the class have suffered substantial damages and losses as a result of the wrongs herein complained of either by tendering their Armour shares and selling the securities in General Host received therefor at a loss, by holding said General Host securities at market values lower than their cost or the cash prices offered by Greyhound, and as to those who purchased Armour securities and did not tender them

to either General Host or Greyhound by selling or disposing of their Armour shares at a price lower than their purchase price.

40. The General Host directors who are defendants herein were at all times material hereto controlling persons of General Host pursuant to Section 20 of the Exchange Act, 15 U.S.C. §78t.

COUNT II
(Section 17(a) of the Securities Act of 1933)

41. Paragraphs 1 through 19 and Count I are realleged and incorporated by reference.

42. On or about December 23, 1968, pursuant to said plan and conspiracy, defendant General Host announced its intention to make the Exchange Offer. On or about December 30, 1968 it filed with the SEC, its Registration Statement and Preliminary Prospectus covering the Exchange Offer of the General Host Securities Package. Said Registration Statement was declared effective on or about January 30, 1969, and the Exchange Offer and Prospectus became effective. Defendants Allen, Inc. and Kleiner Bell acted as dealer managers for the Exchange Offer, which expired on or about February 14, 1969.

43. The said Exchange Offer was one for the offer and sale of securities, and the Prospectus containing the Offer was disseminated by means and instruments of transportation and communication in inter-state commerce, and by the use of the mails, and constituted the knowing and intentional use by

defendants General Host, Pistell, Ashton, Allen, Inc. and Kleiner-Bell pursuant to said conspiracy and plan, of devices, schemes, and artifices to defraud, the obtaining of property or money by means of untrue statements, misstatements or omissions of material facts or omissions to state material facts, required to make other statements made in the light of circumstances under which they were made not misleading, and the engagement in transactions and practices and a course of business which operated and would operate as a fraud and deceit upon purchasers of such securities.

44. In the said offer and sale, via the Prospectus, of the General Host Securities Package to purchasers and prospective purchasers thereof, including holders of Armour common stock and Armour convertible debentures, and in pursuance of said conspiracy and plan, the said defendants named in paragraph 43 above, made misleading statements in and omitted material facts from said Prospectus, including, but not limited to:

a) Existence of the partnership, syndicate or group described in paragraph 21;

b) The making of false filings, as described in paragraph 25;

c) The artificial raising and maintenance of the market price of the General Host Securities Package, pursuant to the transactions and activities described in paragraphs 29 and 30;

d) The artificial raising and maintenance of the market price of Armour common stock relative to Greyhound's

increasing cash tender offer prices, the tampering with the integrity of the market in Armour securities, the intention of the General Host Group to make false and misleading announcements, news releases and advertisements, the preferences and benefits granted and to be granted to certain Armour shareholders and denied to other public Armour shareholders, all as alleged in paragraph 31, the risk factors alleged in paragraph 32(b), the plans and intention of the General Host group to artificially maintain the price of General Host Securities Package sold to them, their associates and affiliates as alleged in paragraph 37, and the other unlawful activities of defendants alleged in this complaint.

COUNT III
(Section 14(e) of the Exchange Act

45. Paragraphs 1 through 19 are realleged and incorporated herein by reference.

46. Pursuant to an Exchange Offer and a request for invitations for tenders of Armour securities made by General Host, and a solicitation of Armour security holders in opposition to Greyhound's Cash Tender Offer and request for an invitation for tenders of Armour securities, defendant General Host and the other defendants named above, made untrue statements of material facts and omitted to state material facts necessary in order to make statements made in the said General Host Prospectus and in public announcements and advertisements, and otherwise, in the light of circumstances under which they were made, not

misleading, as alleged herein in Counts I and II, which are realleged and incorporated herein by reference.

COUNT IV
(At Common Law)

47. The allegations of paragraphs 1 through 19, and of Counts I and II, are realleged and incorporated by reference.

48. The defendants made the above alleged false representations and misleading statements in the Prospectus, and newspaper releases and advertisements and research reports, knowing and intending that the members of the public would rely on them, and would be induced thereby to hold their Armour securities and purchase Armour securities, and refrain from tendering them to Greyhound and tender them to General Host in exchange for the General Host Securities Package, or continue to hold their Armour securities without tendering them to either Greyhound or General Host.

49. The defendants knew that the statements they made to the public in the Prospectus and in the newspaper advertisements and releases and research reports, were false and misleading, and omitted material facts, or the defendants were aware of facts which put them on notice that the same were false and misleading, or the defendants made the aforesaid statements recklessly and carelessly, without knowing whether they were true or false.

50. The plaintiff and members of the class, in continuing to hold their Armour securities and exchanging them

under the Exchange Offer, or in purchasing Armour securities and exchanging them under the Exchange Offer, or in purchasing said securities and continuing to hold them, relied on the truth of the Prospectus, advertisements, filings, releases and reports so published or caused to be published, and sustained damages thereby.

51. The General Host Group and other defendants acted intentionally, wantonly and recklessly in complete disregard of the damage which might be and was caused to the class members by their illegal activities alleged herein and are liable thereby in punitive damages on this count of the complaint.

WHEREFORE, plaintiff prays for judgment:

(a) Awarding plaintiff and all members of the class damages for the wrongs herein complained of, together with punitive damages under Count IV hereof;

(b) Awarding plaintiff the costs and expenses of the litigation, including reasonable counsel and accounting fees; and

(c) Granting such other and further relief as may be just.

Dated: New York, New York
June 29, 1973

MILBERG & WEISS

By Lawrence Milberg
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(212) 594-5300

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,

Plaintiff

against

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,

Defendants

73 CIV. 573
(E. W.)

DEFENDANT PISTELL'S ANSWER TO AMENDED COMPLAINT

Defendant Richard C. Pistell, by his attorneys, Havens, Wandless, Stitt & Tighe, as and for his answer to the amended complaint, respectfully sets forth and alleges as follows:

ANSWERING THE "ALLEGATIONS COMMON TO ALL COUNTS"

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1." of the amended complaint.

2. Admits each and every allegation contained in paragraph "2." of the amended complaint.

3. Denies each and every allegation contained in paragraph "3." of the amended complaint, except admits that he was Chairman of the Board of Directors of General Host from May, 1965 through May, 1970, Chairman of the Board of Directors of Goldfield from in or about 1961 through December 31, 1969, and during a part of that time held at least one other executive position with Goldfield.

Received 7/10/73

4. Denies knowledge or information sufficient t. form a belief as to the truth of the allegations contained in paragraph "4." of the amended complaint, except admits, upon information and belief, Ashton became Chairman of the Board of General Host in or about June, 1970, and was President of General Host from some time in 1967 up until May, 1970.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "5." and "6." of the amended complaint except admits, upon information and belief, that Allen & Co. and/or Allen & Co., Inc. maintained offices in New York City, was a broker-dealer, and served as co-dealer/manager with respect to the Host exchange offer for Armour securities.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "7." of the amended complaint, except admits, upon information and belief, that Kleiner Bell was a broker-dealer which maintained offices in Beverly Hills, California, and acted as co-dealer/manager in connection with the Host exchange offer for Armour securities.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8." of the amended complaint.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "9." of the amended complaint, except admits, upon information and belief, that Klein was Chairman of the Board and/or Chief Executive Officer of National General.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "10." and "11." of the amended complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "12." of the amended complaint, except admits, upon information and belief, that during various periods of time the individual defendants referred to therein were directors of General Host and that Pistell, Ashton, Aiden, Howe and McCaw were, during the same or similar periods of time, also directors of Goldfield.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "13." of the amended complaint, except admits, upon information and belief, that Armour maintains a place of business in Chicago, Illinois, that in or about 1969 Armour had approximately 6.1 million shares of common stock outstanding, and that said shares were publicly traded.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "14." of the amended complaint.

ANSWERING THE "CLASS ALLEGATIONS"

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "15.", "16.", "17.", "18.", and "19." of the amended complaint, except denies all such allegations insofar as they refer to or imply any wrongdoing on the part of Pistell.

ANSWERING COUNT I OF THE AMENDED COMPLAINT

14. Repeats, reiterates and realleges with respect to the allegations contained in paragraph "20." of the amended complaint each and every admission and denial heretofore made to the allegations contained in paragraphs "1." through "19." inclusive of the amended complaint, with the same force and effect as if the same were hereinafter more fully set forth at length.

15. Denies each and every allegation contained in paragraph "21." of the amended complaint, except admits, upon information and belief, that at some time in 1968 Kleiner Bell indicated to General Host that Gulf & Western might be willing to sell its block of Armour common stock.

16. Denies each and every allegation contained in paragraph "22." of the amended complaint, except admits that General Host agreed to purchase 750,000 shares of Armour common stock from Gulf & Western and that a purchase of such shares by General Host was completed in the latter part of 1968.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "23." of the amended complaint, except denies that Pistell purchased any of the securities alleged therein.

18. Denies each and every allegation contained in paragraphs "24." and "25." of the amended complaint.

19. Denies each and every allegation contained in paragraph "26." of the amended complaint, except admits that General Host announced an exchange offer for Armour securities at the end of 1968, that General Host filed a registration statement and preliminary prospectus concerning the same with the SEC, that such

registration statement was declared effective, that the said exchange offer expired in or about February, 1969, and respectfully refers the Court at the time of trial to the documents referred to therein for the actual terms and provisions thereof.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "27." of the amended complaint, except admits that Greyhound announced a tender offer to purchase Armour common stock for cash, that such offer was in effect until some time in February, 1969, and respectfully refers the Court at the time of trial to the actual terms and provisions of such offers and the announcements of Greyhound reflecting the same.

21. Denies each and every allegation contained in paragraph "28." of the amended complaint.

22. Denies each and every allegation contained in paragraph "29." of the amended complaint insofar as the same apply to Pistell, denies, upon information and belief, all such allegations insofar as they apply to General Host and Ashton, and denies knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they apply to the other defendants.

23. Denies each and every allegation contained in paragraph "30." of the amended complaint.

24. Denies each and every allegation contained in paragraph "31." of the amended complaint insofar as the same apply to Pistell, denies, upon information and belief, all such allegations insofar as they apply to General Host and Ashton, and denies knowledge or information as to the truth of such allegations insofar as they apply to the other defendants.

25. Denies each and every allegation contained in paragraph "32." of the amended complaint.

26. Denies each and every allegation contained in paragraph "33." of the amended complaint insofar as the same apply to Pistell, Ashton, General Host and the other individual defendant directors of General Host, and denies knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they may apply to the other defendants.

27. Denies each and every allegation contained in paragraph "34." of the amended complaint.

28. Denies each and every allegation contained in paragraph "35." of the amended complaint, except denies knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they apply to the individual defendants "...other than those named as principals of the General Host Group...".

29. Denies each and every allegation contained in paragraph "36." of the amended complaint, except admits that there came a point in time when General Host had acquired more than 50% of the common stock of Armour.

30. Denies each and every allegation contained in paragraph "37." of the amended complaint insofar as the same apply to Pistell, and denies knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they apply to the activities of other defendants, including Kleiner Bell, Klein, Allen & Co., Lazar, and Cecil and Allen Manus.

31. Denies each and every allegation contained in paragraphs "38." and "39." of the amended complaint.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "40." of the amended complaint, and respectfully refers all questions of law raised therein to this Court for determination at the time of trial.

ANSWERING COUNT II OF THE AMENDED COMPLAINT

33. Repeats, reiterates and realleges, with respect to the allegations contained in paragraph "41." of the amended complaint, each and every admission and denial heretofore made to the allegations contained in paragraphs "1." through "19." and Count I inclusive of the amended complaint, with the same force and effect as if the same were hereinafter more fully set forth at length.

34. Denies each and every allegation contained in paragraph "42." of the amended complaint, except admits that General Host announced an exchange offer for Armour securities in or about late December, 1968, that it filed a registration statement and preliminary prospectus relating thereto, that some time in 1969 the said registration statement, prospectus and exchange offer became "effective", that defendants Allen & Co. and Kleiner Bell acted as co-dealer/managers with respect to such exchange offer, and that the same expired in or about February, 1969.

35. Denies each and every allegation contained in paragraphs "43." and "44." of the amended complaint.

ANSWERING COUNT III OF THE AMENDED COMPLAINT

36. Repeats, reiterates and realleges with respect to the allegations contained in paragraph "45." of the amended complaint, each and every admission and denial heretofore made to the allegations contained in paragraphs "1." through "19." inclusive of the amended complaint with the same force and effect as if the same were hereinafter more fully set forth at length.

37. Denies each and every allegation contained in paragraph "46." of the amended complaint.

ANSWERING COUNT IV OF THE AMENDED COMPLAINT

38. Repeats, reiterates and realleges with respect to the allegations contained in paragraph "47." of the amended complaint each and every admission and denial heretofore made to the allegations contained in paragraphs "1." through "19." and Counts I and II inclusive of the amended complaint, with the same force and effect as if the same were hereinafter more fully set forth at length.

39. Denies each and every allegation contained in paragraphs "48.", "49.", "50." and "51." of the amended complaint insofar as the same apply to defendant Pistell, denies, upon information and belief, all such allegations insofar as they apply to defendants General Host and Ashton, and denies knowledge or information sufficient to form a belief as to the truth of all such allegations insofar as they apply to the other defendants.

AS AND FOR A FIRST AND COMPLETE AFFIRMATIVE DEFENSE

40. The complaint fails to set forth claims against Pistell upon which relief can be granted.

AS AND FOR A SECOND AND COMPLETE
AFFIRMATIVE DEFENSE

41. Plaintiff is barred from bringing and maintaining this action by virtue of applicable principles of equity, including laches, waiver and estoppel.

AS AND FOR A THIRD AND COMPLETE
AFFIRMATIVE DEFENSE

42. Plaintiff is barred from maintaining this action by reason of the applicable statutes of limitations.

AS AND FOR A FOURTH AND COMPLETE
AFFIRMATIVE DEFENSE

43. This action may not be maintained since there are other actions pending, commenced prior in time, in the United States District Court for the Southern District of New York, including "Mesh v. Goldfield, et al" and "Securities and Exchange Commission v. General Host, et al", involving identical or similar issues, identical and/or similar parties, and in which, in part, relief of the same or similar nature has already been requested.

AS AND FOR A FIFTH AND COMPLETE
AFFIRMATIVE DEFENSE

44. That at all relevant times alleged in the amended complaint Pistell acted in good faith and diligently and prudently discharged his duties as an officer and director of General Host and Goldfield and at no time knowingly committed or omitted to commit any acts which acts or omissions are alleged herein to have resulted in violations of federal securities laws or which are alleged to be actionable at common law.

AS AND FOR A SIXTH AND COMPLETE AFFIRMATIVE DEFENSE

45. That at all relevant times alleged in the amended complaint, Pistell, particularly with regard to matters of compliance with the applicable rules and regulations of the Securities and Exchange Commission and the Acts of 1933 and 1934, acted upon and pursuant to the advice, instructions and guidance of legal counsel.

AS AND FOR A SEVENTH AND COMPLETE AFFIRMATIVE DEFENSE

46. Sections 14(d) and (e) of the Securities and Exchange Act of 1934, and the pertinent rules and regulations of the Securities and Exchange Commision promulgated thereunder, are unconstitutional per se and unconstitutional as applied herein to defendant Pistell upon the grounds that such sections and the rules and regulations promulgated thereunder contain language which is vague and ambiguous and which does not properly define the required standard of conduct or give notice as to what conduct or lack of conduct is permissible or proscribed thereunder and, as a result, violates due process of law.

WHEREFORE, defendant Richard C. Pistell demands judgment dismissing the complaint as to him, on the merits and with prejudice, altogether with the costs and disbursements of this action.

Dated: New York, N. Y.
July 18, 1973

HAVENS, WANDLESS STITT & TIGHE
Attorneys for Defendant
Richard C. Pistell
99 Park Avenue
New York, N. Y. 10016

By: /s/ Paul M. Brown
Paul M. Brown

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLAN L. SPEILMAN,

Plaintiff,

- against -

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J.ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W.SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M.LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,

Defendants,

Index No.
73 Civ. 573

ANSWER OF ALLEN & COMPANY TO THE AMENDED COMPLAINT

ALLEN & COMPANY (hereinafter referred to as "ALLEN") answering the amended complaint, by its attorneys, HOLTZMANN, WISE & SHEPARD, alleges as follows:

1. Admits the allegations of paragraphs 2 and 6 of the amended complaint.

2. Denies the allegations of paragraphs 1, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 28 and 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 42, 43, 44, 46, 48, 49, 50, 51 of the amended complaint.

3. Denies the allegations of paragraph 36 of the amended complaint except admits that at some point in time, General Host acquired more than 50% of the Common Stock of Armour.

4. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 8, 10, 11, 14, 27 and 40 of the amended complaint.

5. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of

the amended complaint except admits that Pistell was Chairman of the Board of Directors of General Host from May, 1965 through February, 1969 and was Chairman of the Board of Directors of Goldfield from July, 1961 through February, 1969, and that at various times during that period he held other executive positions with Goldfield.

6. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 4 of the amended complaint except admits that Ashton was a director of General Host from May, 1965 through February, 1969 and was President of General Host from December, 1967 through February, 1969.

7. Denies the allegation of paragraph 5 of the amended complaint which states that Allen "served as investment banker to General Host....."

8. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 7 of the amended complaint except admits that Kleiner Bell was registered with the SEC as a broker-dealer at some period of time and that it served "as co-dealer manager with Allen Inc. of the General Host exchange offer for Armour securities".

9. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 9 of the amended complaint except admits that Klein was Chairman of the Board of Directors and Chief Executive Officer of National General during some of 1968 and 1969, that he served as a Director and Chairman of the Finance Committee of Great American during some part of 1969, and was a participant in the K & S investing partnership.

10. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 12 of the amended complaint except admits that some or all of the defendants specified therein were directors of General Host and of Goldfield during some part of 1968 and 1969.

11. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 13 of the amended complaint that "all of said securities were publicly traded".

FIRST AFFIRMATIVE DEFENSE

12. The amended complaint fails to state a claim against ALLEN, upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

13. Plaintiff is barred from bringing this action by virtue of the applicable statutes of limitations.

WHEREFORE, ALLEN & COMPANY demands judgment dismissing the amended complaint as against it, with costs.

August 1973

HOLTSMANN, WISE & SHEPARD

By: _____
Norman Solovay
(A Member of the Firm)

Attorneys for Defendant
Allen & Company
30 Broad Street
New York, New York 10004
(212) 747-5500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JA 573

- x

ALLAN L. SPEILMAN,
Plaintiff,

- against -

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C.WHITCOMB ALDEN, JR., JOSEPH P. BINNIS, WILLIAM F.DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C.McDONALD, LISLIE W.SCOTT, ALLEN & COMPANY,INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC.,SEYMOUR M.LAZAR, EUGENE V.KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,
Defendants,

- x

Index No.
73 Civ. 573

ANSWER OF ALLEN & COMPANY, INC. TO THE AMENDED COMPLAINT

ALLEN & COMPANY, INC. (hereinafter referred to as "ALLEN, INC.") answering the amended complaint, by its attorneys, HOLTZMANN, WISE & SHEPARD, alleges as follows:

1. Admits the allegations of paragraphs 2 and 6 of the amended complaint.

2. Denies the allegations of paragraphs 1, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 28 and 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 42, 43, 44, 46, 48, 49, 50, 51 of the amended complaint.

3. Denies the allegations of paragraph 36 of the amended complaint except admits that at some point in time, General Host acquired more than 50% of the Common Stock of Armour.

4. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 8, 10, 11, 14, 27 and 40 of the amended complaint.

5. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of

the amended complaint except admits that Pistell was Chairman of the Board of Directors of General Host from May, 1965 through February, 1969 and was Chairman of the Board of Directors of Goldfield from July, 1961 through February, 1969, and that at various times during that period he held other executive positions with Goldfield.

6. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 4 of the amended complaint except admits that Ashton was a director of General Host from May, 1965 through February, 1969 and was President of General Host from December, 1967 through February, 1969.

7. Denies the allegation of paragraph 5 of the amended complaint which states that Allen Inc. "served as investment banker to General Host....."

8. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 7 of the amended complaint except admits that Kleiner Bell was registered with the SEC as a broker-dealer at some period of time and that it served "as co-dealer manager with Allen Inc. of the General Host exchange offer for Armour securities."

9. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 9 of the amended complaint except admits that Klein was Chairman of the Board of Directors and Chief Executive Officer of National General during some of 1968 and 1969, that he served as a Director and Chairman of the Finance Committee of Great American during some part of 1969, and was a participant in the K & S investing pertnership.

10. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 12 of the amended complaint except admits that some or all of the defendants specified therein were directors of General Host and of Goldfield during some part of 1968 and 1969.

11. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 13 of the amended complaint that "all of said securities were publicly traded".

FIRST AFFIRMATIVE DEFENSE

12. The amended complaint fails to state a claim against ALLEN, INC. upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

13. Plaintiff is barred from bringing this action by virtue of the applicable statutes of limitations.

WHEREFORE, ALLEN & COMPANY, INC. demands judgment dismissing the amended complaint as against it, with costs.

August 1973

HOLTZMANN, WISE & SHEPARD

By: _____
Norman Solovay
(A Member of the Firm)

Attorneys for Defendant
Allen & Company, Inc.
30 Broad Street
New York, New York 10004
(212) 747-5500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,

Plaintiff,

against

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

AMENDED ANSWER OF GENERAL HOST CORPORATION, ASHTON, HAMILTON, ALDEN, BINNS, SCOTT, AND HOWE TO AMENDED COMPLAINT

73 Civil 573/EW

Defendants General Host Corporation ("Host"), Harris J. Ashton ("Ashton"), Weston E. Hamilton ("Hamilton"), C. Whitcomb Alden, Jr. ("Alden"), Joseph P. Binns ("Binns"), Leslie W. Scott ("Scott"), and William P. Howe, Jr. ("Howe"), by their attorneys, Lovejoy, Wasson, Lundgren & Ashton, for their amended answer to the amended complaint:

1. Deny each and every allegation of paragraph 1, except acknowledge that plaintiff invokes jurisdiction under Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. Section 77aa) and Section 22 of the Securities Act of 1933 (15 U.S.C. Section 77b) and the principle of pendent jurisdiction, and the procedure

of Rule 23 of the Federal Rules of Civil Procedure.

2. Admit each and every allegation of paragraph 2.

3. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 3, except admit that defendant Richard C. Pistell ("Pistell") was Chairman of Host's Board of Directors from May, 1965, through May, 1970, and Chairman of the Board of Directors of The Goldfield Corporation ("Goldfield") from some time in 1961 through December 30, 1969, and during a part of that time held at least one other executive position with Goldfield.

4. Deny each and every allegation of paragraph 4, except admit that Ashton resides in Greenwich, Connecticut, maintains an office in the Southern District of New York, and was President of Host from December, 1967, through May, 1970, and thereafter Chairman of the Board of Directors of Host.

5. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 5, except admit that Allen & Co., Inc. served as co-dealer-manager with respect to the Host exchange offer for Armour and Company ("Armour") securities.

6. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 6.

7. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 7, except admit that Kleiner, Bell & Co., Inc. was a

co-dealer-manager with Allen & Co., Inc. of the Host exchange offer for Armour securities.

8. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 8.

9. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 9, escept admit that defendant Eugene V. Klein was an executive officer of National General Corporation.

10. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraphs 10 and 11.

11. Deny each and every allegation of paragraph 12, except admit that at certain times the persons mentioned held the positions indicated.

12. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 13, except deny that the principal place of business of Armour is located in Chicago, Illinois, and admit that on or about January 27, 1969 Armour had approximately 6,100,000 shares of common stock.

13. Deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 14.

14. Deny each and every allegation of paragraphs 15, 16, 17, 18 and 19.

15. With respect to paragraph 20, repeat each and every response to each and every allegation of paragraphs 1 through 19.

16. Deny each and every allegation of paragraph 21, except admit that in or about July, 1968, Host learned that a bloc of Armour common stock was available for sale by Gulf & Western Industries, Inc.

17. Deny each and every allegation of paragraph 22 except admit that Host purchased 150,000 shares of Armour stock in August, 1968, and 600,000 shares of Armour stock in October, 1968, and that the total of 750,000 shares constituted approximately 12-1/2% of Armour's outstanding common stock.

18. Deny each and every allegation of paragraphs 23, 24, and 25.

19. Deny each and every allegation of paragraph 26, except admit that Host announced on or about December 23, 1968 its intention to make an exchange offer, and that a registration statement and prospectus were filed with the Securities and Exchange Commission on or about December 30, 1968 and that said exchange offer became effective January 30, 1969 and expired on February 14, 1969, and that under said exchange offer for each share of Armour common stock or principal amount of Armour 4-1/2% convertible subordinated debentures, required upon conversion to obtain one share of Armour common stock, the Armour owner was to receive $60 in principal amount of Host 7% subordinated debentures due February, 1994, plus 2-1/2 warrants each giving the right to purchase one share of Host stock at $40 until January 31, 1979; and that the

prospectus containing the exchange offer was disseminated by mail and other instrumentalities of commerce to the general public.

20. Admit each and every allegation of paragraph 27, except deny knowledge as to the precise times of the changes in the price offered by The Greyhound Corporation.

21. Deny each and every allegation of paragraph 28.

22. Deny each and every allegation of paragraph 29, except deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraphs 29(a), 29(c), 29(d) and 29(e).

23. Deny each and every allegation of paragraph 30.

24. Deny each and every allegation of paragraph 31, except deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraphs 31(a), 31(b), 31(c), 31(d), the first sentence of 31(e) and further with respect to 31(e) admit sending a telegram and causing an advertisement to be published in The Wall Street Journal and refer to the texts of those documents for a complete description of their terms, and 31(h).

25. Deny each and every allegation of paragraphs 32, 33, 34 and 35.

26. Admit each and every allegation of paragraph 36, except aver that Host received more than 50% of Armour outstanding common stock and convertible debentures.

27. Deny each and every allegation of paragraph 37 insofar as it may be intended to allege any acts by them and deny

knowledge or information as to the acts of others.

28. Deny each and every allegation of paragraph 38, except deny knowledge or information sufficient to form a belief as to what plaintiff and members of his purported class relied on in activities with respect to Armour stock.

29. Deny each and every allegation of paragraph 39.

30. Do not respond to paragraph 40 on the ground that it is merely a conclusion of law.

31. With respect to paragraph 41, repeat each and every response to each and every allegation of paragraphs 1 through 19.

32. Admit each and every allegation of paragraph 42, except deny that defendant Host did any act pursuant to any plan and conspiracy as alleged by plaintiff.

33. Deny each and every allegation of paragraph 43, except admit that the exchange offer was one for the offer and sale of securities and that the prospectus containing the offer was disseminated by means and instruments of transportation and communication in interstate commerce and by use of the mails.

34. Deny each and every allegation of paragraph 44.

35. With respect to paragraph 45, repeat each and every response to each and every allegation of paragraphs 1 through 19.

36. Deny each and every allegation of paragraph 46.

37. With respect to paragraph 47, repeat each and every response to each and every allegation of paragraphs 1 through [illegible] and the paragraphs contained in Counts I and II.

38. Deny each and every allegation of paragraphs 48 and

49.

39. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 50, except deny that damages were sustained as alleged.

40. Deny each and every allegation of paragraph 51.

As and For a First Affirmative Defense

41. The complaint fails to state a claim against defendants Host, Ashton, Hamilton Alden, Binns, Scott and Howe upon which relief can be granted.

As and For a Second Affirmative Defense

42. Plaintiff is barred from maintaining this action and his claims herein by the applicable statutes of limitations.

WHEREFORE, defendants Host, Ashton, Hamilton, Alden, Binns, Scott and Howe demand judgment dismissing the complaint with costs and such other relief as the Court may deem proper.

August 14, 1973

LOVEJOY, WASSON, LUNDGREN & ASHTON

By _____
Member of the Firm

Attorneys for Defendants Host, Ashton, Hamilton, Alden, Binns, Scott and Howe
250 Park Avenue
New York, New York 10017
Telephone: 697-4100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,	:	
Plaintiff,	:	73 Civ. 573 (EW)
-against-	:	
GENERAL HOST CORPORATION, et al.,	:	STIPULATION
Defendants.	:	

WHEREAS, plaintiff has moved for an order determining that this action proceed as a class action; and

WHEREAS, defendants have agreed that this action shall conditionally proceed as a class action subject to the approval of the Court; and

WHEREAS, the parties have agreed that the notice to the class include a questionnaire, for informational purposes only, directed to members of the class; and

WHEREAS, all of the agreed provisions of the class notice and the questionnaire are subject to the approval of the Court; and

WHEREAS, this Court has requested an affidavit from plaintiff's counsel concerning the manner by which notice is to be given, a copy of which is annexed hereto as Annex A,

IT IS NOW THEREFORE STIPULATED AND AGREED THAT:

1. The instant action shall proceed, conditionally,

as a class action on behalf of the following former security holders of Armour and Company:

(A) Those persons or entities who were record or beneficial owners of Armour and Company securities, either common stock or convertible debentures, prior to July 29, 1968 and exchanged them for General Host Corporation debentures and warrants pursuant to an Exchange Offer made in a prospectus issued by General Host Corporation under date of January 30, 1969 and which expired February 14, 1969, and who did not accept a cash tender offer of The Greyhound Corporation made January 27, 1969 and which expired February , 1969;

(B) Those persons or entities who purchased or otherwise acquired Armour and Company securities, either common stock or convertible debentures, between July 29, 1968 and February 14, 1969, did not accept The Greyhound Corporation tender offer, and exchanged said Armour and Company securities for General Host Corporation debentures and warrants issued pursuant to the said Exchange Offer;

(C) Those persons or entities who purchased or otherwise acquired Armour and Company securities between July 29, 1968 and February 14, 1969 and held them without tendering them to either

General Host Corporation or The Greyhound Corporation on or before February 14, 1969; who sustained damages when they later sold or disposed of their securities at lower prices or continued to hold them at lower values.

2. A class notice in the form annexed hereto as Annex B shall be mailed to members of the class within six (6) months after the date hereof.

3. A questionnaire in the form annexed hereto as Annex C shall be mailed to members of the class together with the aforesaid class notice, for informational purposes only, and with no requirement that the questionnaire be answered.

4. Plaintiff shall bear the cost of the compilation of the list of class members and the printing and mailing of the class notice and questionnaire.

5. Defendants' consent to this action proceeding as a class action is conditional and without prejudice to their right to move at any future time prior to the entry of a pre-trial order to vacate or modify said consent.

Dated: New York, New York
~~January~~ MARCH 26, 1974

MILBERG & WEISS

By Melvyn I. Weiss
Attorneys for Plaintiff

HOLTZMAN, WISE & SHEPARD

By _____
Attorneys for Defendants
Allen & Company, Inc. and Allen & Company

WILLIAMS, CONNOLLY & CALIFANO

By _____
Attorneys for Defendants
Allen S. Manus and Cecil Manus

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

By _____
Attorneys for Defendant
Great American Insurance Company

LOVEJOY, WASSON, LUNDGREN & ASHTON

By _____
Attorneys for Defendants
General Host Corporation, Weston E. Hamilton, C. Whitcomb Alden, Jr., William P. Howe and Harris J. Ashton

POMERANTZ, LEVY, HAUDEK & BLOCK

By _____
Attorneys for Defendant
Eugene V. Klein

HAVENS, WANDLESS, STITT & TIGHE

By _____
Attorneys for Defendant
Richard C. Pistell

HOLTZMAN, WISE & SHEPARD

By _____
Attorneys for Defendants
Allen & Company, Inc. and Allen & Company

WILLIAMS, CONNOLLY & CALIFANO

By _____
Attorneys for Defendants
Allen S. Manus and Cecil Manus

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

By Robert E. McCann
Attorneys for Defendant
Great American Insurance Company

LOVEJOY, WASSON, LUNDGREN & ASHTON

By _____
Attorneys for Defendants
General Host Corporation, Weston E. Hamilton, C. Whitcomb Alden, Jr., William P. Howe and Harris J. Ashton

POMERANTZ, LEVY, HAUDEK & BLOCK

By _____
Attorneys for Defendant
Eugene V. Klein

HAVENS, WANDLESS, STITT & TIGHE

By _____
Attorneys for Defendant
Richard C. Pistell

CLIFFORD, WARNKE, GLASS, McILWAIN
& FINNEY

By_____
Attorneys for Defendant
Seymour M. Lazar

SO ORDERED: April 7, 1974

/s/ Edward Weinfeld
U.S.D.J.

GOLDFELD, CHARAK, BROWN, TOLINS
& LOWENFELS

By_____
Attorneys for Defendant
Kleiner, Bell & Co., Inc.

CLIFFORD, WARNKE, GLASS, McILWAIN
& FINNEY

By Paul C. Warnke
Attorneys for Defendant
Seymour M. Lazar

SHIDLER, McBROOM, GATES & BALDWIN

By_____
Attorneys for Marion O.
McCaw, as Executrix of the Estate
of J. Elroy McCaw, deceased

SO ORDERED:

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,	:	
Plaintiff,	:	73 Civ. 573 (EW)
-against	:	AFFIDAVIT
GENERAL HOST CORPORATION, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MELVYN I. WEISS, being duly sworn, deposes and says:

1. I am a member of Milberg & Weiss, attorneys for plaintiff in the above proceeding and make this affidavit pursuant to this Court's direction with respect to the adequacy of the class notice being given by mail in this proceeding.

2. This action was brought pursuant to the Securities Act of 1933 and the Securities and Exchange Act of 1934 and principles of common law. It has been instituted as a class action on behalf of all securities holders of Armour and Company (Armour) who tendered their Armour securities to General Host Corporation pursuant to an exchange offer dated January 30, 1969 and which expired on February 14, 1969, and on behalf of those

securities holders of Armour who purchased between July 29, 1968 and February 14, 1969 and held them without tendering them to either General Host Corporation or The Greyhound Corporation, and who sustained losses on said transactions.

3. The Armour transfer records are presently located at the offices of Greyhound Corporation in Phoenix, Arizona. I personally visited said offices and examined the said records.

4. I also discussed the contents of the transfer records with the Law Department of Greyhound Corporation to determine the feasibility of notifying the class members by mail.

5. I am satisfied, based upon such examination and the discussions held, that all the transfer records are intact and that all record owners of Armour securities during the relevant period are identifiable in the transfer records of Armour now in the possession of Greyhound Corporation and that said records also contain the mailing addresses of the class members during the times of the transactions alleged. Further since all but a relatively small percentage of Armour securities holders exchanged for General Host securities, the identity of this large segment of the class is ascertainable.

6. The manner of notice stipulated to by the parties is the most practicable form of notice in this action.

MELVYN I. WEISS

Sworn to before me this
22nd day of January 1974.

NOTARY PUBLIC

RUTH C. HADGIS
NOTARY PUBLIC, State of New York
No. 03-4508537
Qualified in Bronx County
Commission Expires March 30, 1975

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF PENDENCY OF CLASS ACTION

Re: Alan L. Spielman v. General Host Corporation, Richard C. Pistell, Harris J. Ashton, C. Whitcomb Alden, Jr., Joseph P. Binns, William F. Downey, Weston E. Hamilton, William P. Howe, Jr., J. Elroy McCaw, Edwin C. McDonald, Leslie W. Scott, Allen & Company, Inc., Allen & Company, Kleiner Bell & Co., Inc., Seymour M. Lazar, Eugene V. Klein, Allen Manus, Cecil Manus and Great American Insurance Company. (No. 73 Civil 573/EW)

TO: CERTAIN FORMER HOLDERS OF COMMON STOCK AND 4-1/2% CONVERTIBLE SUBORDINATED DEBENTURES DUE SEPTEMBER 1, 1983 OF ARMOUR AND COMPANY DESCRIBED BELOW:

(A) Those persons or entitites who were record or beneficial owners of Armour and Company seucrities, either common stock or convertible debentures, prior to July 29, 1968 and exchanged them for General Host Corporation debentures and warrants pursuant to an Exchange Offer made in a prospectus issued by General Host Corporation under date of January 30, 1969, and which expired February 14, 1969, and who did not accept a cash tender offer of The Greyhound Corporation made January 27, 1969 and which expired February 13, 1969;

(B) Those persons or entities who purchased or otherwise acquired Armour and Company securities, either common stock or convertible debentures, between July 29, 1968 and February 14, 1969, did not accept The Greyhound Corporation tender offer, and exchanged said Armour and Company securities for General Host Corporation debentures and warrants issued pursuant to the said Exchange Offer;

(C) Those persons or entities who purchased or otherwise acquired Armour and Company securities between July 29, 1968 and February 14, 1969 and held them without tendering them to either General Host Corporation or The Greyhound Corporation on or before February 14, 1969;

who sustained damages when they later sold or disposed of their securities at lower prices or continued to hold them at lower values.

Pursuant to Rules 23(c)(2) and 23(d) of the Federal Rules of Civil Procedure, you are hereby notified:

The representative claims asserted in the Amended Complaint in the above-entitled action, based on the Securities Act of 1933, the Securities Exchange Act of 1934 and the principles of common law, allege that the defendants formed a group and acted, pursuant to a common plan and conspiracy, in connection with the issuance and promotion by General Host Corporation of the Exchange Offer, and to make the said Exchange Offer more attractive than a competing cash tender offer of The Greyhound Corporation made through its subsidiary ("Greyhound Cash Tender Offer"). It is alleged in the Amended Complaint that the activities of the defendants imparied the integrity of the market in Armour and Company securities, artificially maintained or inflated the price of General Host common stock to make the Exchange Offer relatively more attractive than the Greyhound Cash Tender Offer; that the Exchange Offer omitted to disclose the illegal activities of the defendants and certain risk factors involved to those Armour securities holders who exchanged their Armour securities for the General Host securities issued under the Exchange Offer; that the activities of the defendants were otherwise false and misleading, and that the defendants are liable to the plaintiff and the class members for losses sustained by them.

The defendants have denied all the material

allegations of the Amended Complaint; have denied that there were any misrepresentations or material omissions with respect to the Exchange Offer; have denied any market manipulation, and have denied any and all wrongdoings whatsoever as claimed in the Amended Complaint.

This Notice is being sent to you in the belief that you are or may be a member of the class and to inform you of the pendency of this litigation so that you may decide appropriately what steps, if any, to take in relation to the lawsuit.

The Court has determined conditionally that this action shall be maintained as a class action and has defined the class as described in (A), (B) and (C) above.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION BY THE COURT AS TO THE MERITS OF ANY CLAIM OR DEFENSE ASSERTED BY EITHER SIDE IN THIS LITIGATION but is sent for the sole purpose of informing you of the pendency of this litigation and of your rights under Rule 23 of the Federal Rules of Civil Procedure so that you may decide what steps you may wish to take in relation thereto.

If you are a member of the class you will be deemed to be a party to the action and bound by any judgment of the Court, whether favorable or unfavorable, unless on or before ~~July~~ August 1, 1974 you file a written election to be excluded from the class.

Amend to this extent 7-4-74

Your Request for Exclusion and all other documents to be filed of record in this case should be addressed to:

Clerk
United States District Court
Southern District of New York
c/o Post Office Box
New York, New York 10001

Counsel for the class described above is:

Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

Any member of the class who does not request exclusion may, but need not, enter an appearance through his own counsel if he desires. If you do not request exclusion and do not enter an appearance through separate counsel, plaintiff and his counsel will be deemed to represent your interest in this action.

The Court files in this action are available for inspection during regular office hours at the Office of the Clerk, United States District Court, Southern District of New York, Foley Square, New York, New York 10007.

RAYMOND F. BURGHARDT
Clerk

NOTICE

This Notice is for information only, and does not affect your rights under the accompanying Notice of Pendency of Class Action. It is requested that each person receiving this Notice answer the following questions. After completing the answers please return this Notice to:

The Clerk of the Court
United States District Court
Southern District of New York
c/o Post Office Box
New York, N.Y.

1. Where did you reside between July 29, 1968 and February 14, 1969?

2. Did you move during that period? If so, when?

3. If the answer to Question 2 is affirmative, please list below your addresses both before after your move.

4. Did you purchase common stock or convertible debentures of Armour and Company between July 28, 1968 and February 14, 1969? If the answer is yes, what was the date of the purchase?

5. With respect to common stock or convertible debentures of Armour and Company owned, purchased or otherwise acquired by you between July 28, 1968 and February 14, 1969, did you dispose of your holdings by:

	Yes	Date
(a) tendering to General Host Corporation;	____	/ /
(b) tendering to the Greyhound Corporation;	____	/ /
(c) selling in the market; or	____	/ /
(d) Other (specify)_____	____	/ /

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JA 598

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U.S. DISTRICT COURT
FILED
MAY 15 1974
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,

Plaintiff,

-against-

GENERAL HOST CORPORATION, et al.,

Defendants.

73 Civ. 573 (EW)

ORDER

MICROFILM
MAY 16 1974

IT IS HEREBY ORDERED that the Stipulation dated March 26, 1974 providing that this action proceed as a class action be amended to the extent that the date of "July 1, 1974" contained in the last paragraph of page 3 of the "Notice of Pendency of Class Action" annexed to the aforesaid Stipulation, shall now read "August 1, 1974".

Dated: New York, New York
May 14, 1974.

ORDERED.

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,

Plaintiff,

-against-

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON F. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

73 Civ. 573 (EW)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff respectfully requests that the Court make the following findings of fact and conclusions of law:

PROPOSED FINDINGS OF FACT

1. In or about July, 1968, General Host's principal business was the manufacture and distribution of bread and other food products. Its stockholders' equity was approximately $35 million.[1] (Stip., ¶ 1)

2. In 1968 Armour & Co. was a company whose common shares were traded on the New York Stock Exchange and whose princip business was the slaughter of livestock; processing, buying and selling of various food products; production and marketing of fertilizer; manufacturing and marketing of various soaps and other related products; producing and marketing of fatty acids and other similar products; the manufacture and marketing of abrasives, ad-

[1] Stipulated Facts in the Pretrial Order are referred to as "Stip." followed by the paragraph number.

hesives and similar products; the tanning of hides and producing and marketing of various leather products; manufacturing and marketing of ethical pharmaceuticals and the manufacture and marketing of construction equipment. It was at that time the second largest meat packer in the United States and had a net worth and shareholder equity of approximately $346 million. (Stip. ¶ 20).

3. Prior to July of 1968, Gulf & Western Industries, Inc. became the owner of 750,000 shares of Armour's outstanding common stock. Armour was subject to a United States Department of Justice 1920 Packers' Consent Decree which might have prevented the merger or consolidation of Gulf & Western and Armour. In or about July, 1968, Armour tendered for 1,500,000 of its own shares. (Stip. ¶ 21)

4. On or about August 5, 1968 there was a meeting at which there were present representatives of General Host, Gulf & Western and Allen & Company, Inc. to discuss the sale of Gulf & Western Armour holdings to General Host. (Stip. ¶ 22)

5. Allen Inc. acted as a managing underwriter of shares of common stock of General Host in May of 1967. (Stip. ¶ 16)

6. Allen Inc. acted as a managing underwriter for sha of common stock of Uncle John's Restaurants, Inc., 41% of the stock of which was owned by General Host, in August of 1967. (Stip. ¶ 17)

7. Allen Inc. acted as a managing underwriter of shares of common stock of General Host in April of 1968. (Stip. ¶ 18)

8. On or about August 6, 1968, an agreement was entered into whereby General Host agreed to purchase 150,000 shares of Armour common stock at $56 per share and obtained an option to purchase the remaining 600,000 shares at $60 per share. General Host issued to Gulf & Western 175,000 General Host ten-year warrants exercisable at $30 per share in consideration for the said option. Subsequent to August 5, 1968, Allen Inc. formed a group of investors to take down a private placement of a new issue of $47.4 million of General Host 5% Convertible Subordinated Notes due 1988 to finance the purchase by General Host of certain shares of Armour securities from Gulf & Western. (Stip. ¶ 23)

9. The closing of the initial purchase of 150,000 shares of Armour from Gulf & Western took place on August 16, 1968. The closing of the purchase of the optioned 600,000 Armour common shares took place on October 15, 1968 and made General Host the holder of 12% of Armour's then outstanding stock. (Stip. ¶ 24)

10. Allen Inc. acted as an agent, together with Kleiner, Bell & Co., Inc., on behalf of General Host in the sale of $47,400,000 principal amount of 5% Convertible Subordinate Notes due June 15, 1988, in a private offering which was closed October 15, 1968. Allen Inc. received $533,250.00 as its share of the fee paid therefor (Stip. ¶ 19)

11. On November 1, 1968, General Host entered into a loan agreement to borrow up to $20 million from banks to finance

the purchase of additional Armour shares. Thereafter General Host borrowed $14 million under said loan agreement and purchased prior to December 30, 1968 an additonal 252,000 shares. These purchases brought General Host's ownership of Armour stock to 1,002,500 shares representing approximately 16.5% of Armour's then outstanding common stock. (Stip. ¶ 25)

12. In or about September, 1968, pursuant to instructions by Harris J. Ashton, then President of General Host, a study was drafted entitled "Confidential Report on Armour and Company", and dated October 1968 ("Confidential Report"). During October 1968, the Confidential Report was seen by Richard C. Pistell, Harris J. Ashton and the Department of Justice. The "Confidential Report" is sometimes referred to as the "Armour Study" or the "Black Book" as stipulated by the parties during trial. (Stip. ¶ 28)

13. The Confidential Report contained a section entitled "Legal Implications" which, in part read as follows:

"Special Meeting of Stockholders

> Pursuant to Armour's By-Laws, special meetings of stockholders may be held for any purpose at such time or place as shall be stated in the notice of meeting. Special meetings may be called by the Chairman, the President or the Board of Directors. Stockholders do not have the right to call a special meeting. The advance notification of the record date required in the case of annual meetings is also required in the case of special meetings, except that Delaware law specifies twenty days' minimum notice of a special meeting called to consider a merger.

* * * *

"Election of Directors

> The Board of Directors has seventeen members divided into three classes. Each director has a three year term of office. Six directors come due for election in 1969, five in 1970 and six in 1971. Voting for directors need not be by ballot.
>
> Voting for directors is cumulative pursuant to the Certificate of Incorporation and By-Laws. To determine the minimum number of

shares needed to insure a given number of directors the following formula may be used:

$$x = \frac{ac}{b+1} + 1$$

x = minimum number of shares required, assuming that all outstanding shares are voted

a = total shares

c = number of directors desired to elect

b = number of directors to be elected

Assuming all outstanding shares are voted, the following number of shares would be needed to elect the following numbers of directors in 1969:

Number of Directors	Shares Needed
1	864,259
2	1,728,513
3	2,592,769
4	3,457,024
5	4,321,280
6	5,185,536"

* * * *

"Amendment of Articles of Incorporation

Section 242 of the Delaware General Corporation Law requires the Board of Directors to adopt a resolution setting forth the proposed amendment, declaring its advisability and calling a special meeting of the stockholders entitled to vote on the amendment to consider it or directing that the proposed amendment be considered at the next annual stockholders meeting. Section 242(d)(1) states that at the meeting a vote of stockholders entitled to vote shall be taken by ballot for or against the proposed amendment. The proposed amendment must be favorably acted upon by the majority of the stock entitled to vote (or each class of stock when such vote is to be taken by classes)."

* * * *

"Amendment of By-Laws

Section 109 of the Delaware General Corporation Law provides that the power to amend By-Laws shall be in the stockholders; this Section also provides, however, that the corporation may in its Certificate of Incorporation confer that power upon the directors. The Armour Certificate of Incorporation gives that power to the Board of Directors.

It is not clear (a) whether the Armour Certificate of Incorporation could be construed to purport to take all power to amend By-Laws away from stockholders, and (b) whether, if so construed, the Certificate of Incorporation would be in compliance with Delaware law. Armour may be expected to contend that the By-Laws may be amended only by its directors and not by its stockholders. While the answer to the question is not clear, however, preliminary review indicates that there is a substantial likelihood that action taken by a majority of the stockholders at an annual meeting to amend the By-Laws to, for instance, increase the number of Armour directors would be held to be binding upon the Corporation."

14. In December 1968, a meeting was held between General Host representatives and Allen Inc. representatives where Allen Inc. expressed its opinion that 40% ownership in the company would result in absolute control of Armour & Company"[2] (Tr. p. 208)

15. In December 1968, General Host prepared for inclusion in a proposed Prospectus pro forma financial statements combining financial statements of General Host and Armour giving effect to the proposed tender offer under the assumption that upon obtaining 51% or more of Armour's stock, "General Host would ultimately control Armour & Company's board". (Tr. p. 217) The pro forma financial statements of Armour and General Host were prepared on the basis that the SEC requires such a presentation in the Exchange Offer and "that the

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2 Pages of the trial transcript are referred to as "Tr." followed by the page number.

assumptions upon which the statements are prepared be set forth clearly" (Tr. p. 219).

16. At that time General Host's assumption was that the passage of control of Armour's Board of Directors to General Host would take place "at the first annual meeting which was to be held ... in late February of 1969" (Tr. pp. 217-218).

17. Glynn, General Host's then comptroller, who assisted in the preparation of the Prospectus and pro forma financial statements, relied on Allen Inc.'s advice given in December, 1968 that by getting at least 40% ownership of Armour's common stock, General Host would be able, within a short time thereafter, to obtain control of the Board of Directors of Armour (Tr. p. 218)

18. Glynn further testified that his understanding of the words "control would pass" had nothing to do with the numerical count of directors but "to the ability to influence the Company's actions and affairs" (Tr. p. 220). Shortly after so testifying Glynn also testified that he and the other members of the General Host management, in early December, 1968, were aware of the fact that the Armour management was opposed to any involvement by General Host in Armour's affairs (Tr. p. 222).

19. Up to at least December 30, 1968, the Directors and managers of Armour refused to meet with General Host's representatives for the purpose of discussing the possibilities of merger, or of General Host's influencing the policy of Armour, and further indicated a firm resistance to any attempt by General Host to so involve itself with Armour (Stip. ¶ 26).

20. General Host's Registration Statement as filed with the SEC on Form S-1 on December 30, 1968 related to a proposed

offering of $346,200,000 7% Subordinated Debentures due January 31, 1994 and 8,655,000 warrants expiring January 31, 1979 to purchase General Host Common Stock at $45 per share. The debentures and warrants were to be exchanged for common stock of Armour in the ratio of $60 principal amount of debentures and 1-1/2 warrants for each share of Armour Common Stock. Amendment No. 1 to the Registration Statement as filed on January 23, 1969 increased the principal amount of Debentures being offered to $347,040,000 and the Warrants to 8,676,000 so as to include an offering not only for Common Stock of Armour but Armour's outstanding 4-1/2% Convertible Subordinated Debentures. (Stip. ¶ 37)

21. In January 1969 Armour and an individual purporting to be an Armour shareholder instituted a class action alleging, among other things, that General Host, its Directors and Dealer-Managers were engaging in conspiracies and acts in violation of the securities laws, and sought to enjoin the making and consummation of General Host's Exchange Offer ("Armour and Kelley litigation"). The said action was based upon General Host's initially filed S-1 which was filed with the SEC on December 30, 1968. (Stip. ¶ 39)

22. On January 27, 1969 the Greyhound Corp. ("Greyhound") through a subsidiary, announced its offer to purchase up to 41% of Armour's common stock for cash, at a price of $65 per share, retaining the option to accept more than 41%. On January 27, 1969, Armour also sent a letter to its stockholders transmitting Greyhound's tender offer to them. On January 29, 1969, Greyhound's offer was increased to $70 -- cash -- per share and thereafter increased to $72 -- cash -- per share with the further announcement that it would accept all shares tendered. (Stip. ¶ 43). On January 31, 1969 Greyhound announced that it had already acquired approximately 1.2 million Armour shares (20%) out of approximately 6.1 million shares of Armour stock then outstanding. (Exh. A55).

23. On January 29, 1969 Amendment No. 2 to the Prospectus was filed by General Host and became effective on January 30, 1969. (Stip. ¶38) The General Host Exchange Offer, which became effective on January 30, 1969, contained provisions that "all tenders of Armour securities are irrevocable until the earlier of the Expiration Date or March 31, 1969..." (Exh. 23, p.4). Amendment No. 2 contained the following new language at page 9 under the subtitle "Antitrust Aspects":

> "On January 21, 1969, General Host won complete dismissal of a legal action instituted the day before by the Department of Justice in the United States District Court for the Northern District of Illinois. This action had sought to enjoin General Host from proceeding with the Exchange Offer or from otherwise acquiring additional shares of Armour stock. It had been based upon the theory that a 1920 Packers' Consent Decree which resulted from an earlier lawsuit against Armour (United States v. Swift and Company, et al.) is or could be made applicable to General Host Corporation. The Federal Court rejected this theory and held that this Decree does not forbid acquisition by General Host of a controlling stock interest in Armour." (Exh. 23, p. 9) (Emphasis added)

24. In addition, under the section "Other Aspects of the Exchange Offer" there was contained the following additional new language in the Prospectus:

> "General Host intends to act promptly both before and after consummation of the Exchange Offer to obtain control of the board of directors and management of Armour. In this connection it may engage in the solicitation of proxies for the election of directors of Armour and other matters, both at the February 21, 1969 annual meeting of Armour and Company and otherwise.
>
> General Host may find it desirable upon consummation of the Exchange Offer to propose to stockholders of the relevant cor-

> porations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of portions of the assets presently held by it or by Armour. If no such merger or consolidation occurs, and if General Host has not acquired more than 80% of Armour's Common Stock, which would allow it to enter into tax-savings arrangements, General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour, or to incur new indebtedness or issue additional equity securities." (Exh. 23, p.9)

25. The above quoted language contained on page 9 of General Host's Prospectus, which became effective on January 30, 1969, was materially false and misleading in that it omitted to state material facts necessary in order to make the statement made therein, in the light of the circumstances under which they were made, not misleading, in that it represented that "upon consummation of the Exchange Offer" General Host could (i) increase Armour's dividends; (ii) cause the sale of Armour assets; (iii) through steps taken before consummation of the Exchange Offer and through the solicitation of proxies at Armour's February 21, 1969 annual meeting obtain control of the Board of Directors and management of Armour; and (iv) cause the merger of Armour and General Host. (Exh. 23, p. 9)

26. The statements were materially misleading in that they omitted any reference to the risk factors and uncertainties which could prevent General Host from achieving the aforesaid objectives resulting from the fact that Armour had a staggered board and cumulative voting (Exh. 8, pp.125-126) and that Delaware law (Exh. 8, pp. 127-128) required the vote of at least 2/3 of Armour's shareholders to effect a merger (Exh. 23, p. 9, Exh. 8, pp. 127-128) and that other defensive tactics were available to Armour as stated in the Ashton affidavit set forth in paragraph 31 herein.

27. In addition, the statement that General Host "upon

consummation of the Exchange Offer ... might find it desireable to dispose of portions of the assets presently held... by Armour ... or increase the dividend paid on common stock by Armour" is materially misleading because it is made without condition or qualification other than "consummation of the Exchange Offer". This is stated as the sole predicate to General Host's ability to dispose of Armour assets or increase Armour's dividends. (Exh. 23, p. 9).

In fact, General Host could not merely "upon consummation of the Exchange Offer", which required only the tender of more than 50% of the Armour stock, accomplish any of these results. The required approval of the Board of Directors, control of which did not automatically pass to General Host "upon consummation of the Exchange Offer", was subject to the impediments and risks which the Prospectus did not disclose. (Exh. 21, pp.60-68)

28. Ashton, Herbert A. Allen[1], and Glynn testified that they believed General Host might get operating control of Armour's Board of Directors through means other than solicitation of proxies or voting for the election of directors at the February 21, 1969 meeting, ie - by resolution of shareholders to increase Armour's board or voluntary cooperation by Armour's directors. (Tr. pp. 223, 261, 417). Neither of those possibilities were mentioned in the Prospectus nor were the substantial risks attendant to those alternatives disclosed. (Exh. 23)

29. Glynn testified that General Host felt that Armour's management "was prepared to do anything regardless of whether or not it was detrimental to the interest of all Armour

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[1]President of Allen Inc.

shareholders to dilute the General Host stock position in the Company (Armour)" (Tr. pp. 232-233). Ashton testified that he relied upon the opinion of Delaware counsel in coming to the conclusion that the shareholders could cause an increase in Armour's board of directors by shareholder resolution. (Tr. p. 448). The opinion referred to was dated February 7, 1969, 9 days after the filing of the final Prospectus (A61). The opinion was not based upon any rendered decision or statutory authority and was contrary to Article 10 of the Certificate of Incorporation of Armour. Further Ashton did not know of any decision or statutory authority to support the opinion (Tr. p. 450). In addition, the opinion was contrary to Section 242 of the Delaware Corporation Law which required a Board of Directors' resolution and read in pertinent part as follows:

> "§242. Amendment of certificate of incorporation after receipt of payment for stock; non-stock corporations
>
> (a) After a corporation has received payment for any of its capital stock, it may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment; and, if a change in stock or the rights of stockholders, or an exchange, reclassification or cancellation of stock or rights of stockholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification or cancellation."
>
> * * * *
>
> " (c) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner --
>
> (1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amend-

> ment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders. Such special or annual meeting shall be called and held upon notice in accordance with section 222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby, as the directors shall deem advisable."

30. The alternative methods testified to by Messrs. Ashton, Glynn and Herbert A. Allen were contrary to statements made by Ashton in an affidavit submitted to Judge Julius J. Hoffman. In addition, it was contradicted by Glynn's testimony that he knew in December 1968 that Armour opposed any intervention by General Host in Armour's affairs. (Tr. p.222)

31. Ashton stated in his affidavit dated January 23 1969 and submitted to Judge Hoffman on January 27, 1969 in the Government Anti-Trust action in Chicago, Illinois, the following:

> 7. The Government's application for an order restraining General Host's proposed exchange offer should be denied at this time as premature. The Government alleges that control of Armour by General Host is prohibited by the Packers' Consent Decree and that such control is imminent. In fact, however, control of Armour by General Host is far from imminent and it may never occur. Although General Host is currently Armour's largest stockholder, its present holdings do not give it control of Armour and are sufficient only to enable it to obtain minority representation on Armour's Board of Directors. This point is explained in more detail later in this affidavit.
>
> 10. Even if General Host acquires a controlling stock interest in Armour through its exchange offer, it does not appear possible under Armour's present Certificate of Incorporation and By-Laws, for General

Host to elect a majority of Armour's directors at the 1969 Annual Meeting which is presently scheduled to be held February 21, 1969. It may not be possible for General Host to control Armour by electing a majority of its directors prior to the 1970 Annual Meeting.

11. Armour's Certificate of Incorporation and By-Laws (copies of which are attached hereto as Exhibits D and E, respectively) provide that the Board of Directors shall consist of seventeen persons divided into three classes. Each director has a three-year term of office. Six directors are due to be elected in 1969, five in 1970 and six in 1971. The Certificate and By-Laws also provide for cumulative voting for directors. Assuming that all of the 6,095,000 presently outstanding shares are voted, the following number of shares are needed to elect the following number of directors in 1969:

Number of Directors	Shares Needed
1	864,259
2	1,728,513
3	2,592,769
4	3,457,024
5	4,321,280
6	5,185,536

From the foregoing calculation it can be seen that General Host's present holdings of just over 1,000,000 shares of Armour stock are sufficient to guarantee election of no more than one director in 1969. At most, two directors might possibly be elected by General Host if some of Armour's stockholders do not vote.

12. Moreover, only six of Armour's present seventeen directors are standing for election at the forthcoming Annual Meeting. Therefore, even if every presently outstanding share of Armour stock were tendered, it does not appear presently possible for General Host to elect more than six directors out of seventeen in 1969. Of course, it is highly unlikely that all outstanding stock will be tendered. Certainly, General Host has no reason to suppose that Armour's present management will tender its stock. Therefore, realistically, General Host cannot expect to own

enough stock to elect more than four or possibly five directors at the 1969 Annual Meeting, even if General Host obtains valid proxies to vote the stock from all persons who tender to it.

13. Not only may General Host have only a minority position on Armour's Board during 1969 regardless of the extent of its ownership of Armour stock, but in addition, General Host may very well have no representative at all on the Executive Committee of the Board. Armour's By-Laws provide for an Executive Committee which is elected by the directors and which presently consists of eleven of the seventeen directors, including the Chairman and the President. This Executive Committee may exercise most of the powers of the Board of Directors in the management of the business and affairs of Armour, including the hiring and firing of employees. The present management clearly controls the members of the Board and the Executive Committee.

14. So long as the present management retains a majority position on the Board of Directors and the Executive Committee, it can continue to control and operate Armour for a considerable period of time. Thus, even assuming that General Host acquires a majority stock interest in Armour through the exchange offer, it may [not] control Armour for a considerable time."

22. Reports have reached us from time to time that Armour's present management is very anxious to avoid control by General Host. Since Armour's present management has already sought possible acquisitions in exchange for Armour stock, there is every reason to suppose that they will continue to look for future acquisitions to dilute General Host's interest and perpetuate their own control of Armour. (emphasized added) (Exh. 21, pp. 60-68)

32. In further contradiction to the testimony of the above-mentioned individuals that General Host could obtain operating control of Armour's board of directors, Mr. McDowell testified that he was aware that even if General Host owned 51% or more of Armour there was no assurance that it could control Armour's Board of Directors (Tr. p. 281), and that he knew that "if all of the shareholders other than their (General Host's) own were voted for nominees other than theirs (General Host) and if all of the Armour directors who were not up for re-election continued their opposition to General Host, they would not have the majority of the board of directors in favor

of their programs and plans at the time, obviously" (Tr. p. 291), and further that he "did not know at that time how they would achieve their stated objective in the prospectus to gain control and a majority of the board ... " but that he was relying upon his "general feeling that they would be able to do it in one fashion or another" (Tr. p. 291).

33. Glynn testified that the pertinent language contained at page 9 of the Prospectus under the section "Other Aspects of the Exchange Offer" presumed control of the board of directors to accomplish (Tr. pp. 229-230).

34. The presumption of control and General Host's ability to achieve that control without any risk or impediment is reinforced by the statement at page 9 under the section "Antitrust Aspects" wherein it is stated " ... the federal court ... held that this Decree does not forbid acquisition by General Host of a controlling stock interest in Armour" (Exh. 23, p. 9).

35. The pertinent language at page 9 of the Prospectus which misrepresents General Host's ability to increase Armour's dividends and dispose of Armour assets "upon consummation of the Exchange Offer", was consistent with the numerous public announcements, press releases and letters to Armour shareholders which appeared in the press and were used by Armour in December 1968 and January and February 1969. Each of those newspaper articles, letters or advertisements represented that General Host was seeking "control" of Armour and that if General Host succeeded in its Exchange Offer it would "control" Armour. As examples: (Exhs. A-26, A-31, A-34(1) and A-43)

36. McDowell[1/] testified that the General Host's Prospectus was in effect representing to the Armour shareholders that General Host "will offer you a piece of paper whereby you will get an annual basis interest which was more than you are getting as a dividend, considerably more in this case, and I (General Host) will take over your company, and it is my belief that with the people that we have and the ideas that we have that we can make that company (Armour) move forward better than the present management that has demonstrated that it hasn't been able to do this very well" (Tr. pp. 287-288).

37. General Host's ability to obtain operating control of Armour, to manage Armour affairs and to direct the use of Armour's resources, and the time when such abilities could be implemented, if e were material factors to Armour shareholders in making their investment decision as to whether or not to accept General Host's debentures and warrants in exchange for their Armour securities.

38. Herbert A. Allen testified that he felt that General Host could obtain control of a majority of Armour's Board of Directors within one year after the Exchange either through the voluntary cooperation by Armour's then Board of Directors and that he did not contemplate any alternative way to obtain such control (Tr. p. 261); that he did not tie in the ability of General Host to get control of Armour's Board of Directors to any shareholders meeting (Tr. p. 269); that he was aware that Armour had a staggered board and that General Host would have to deal with the problem but that he did not have any method in mind except voluntary resignation (Tr. p. 265); that he spoke to Ashton about it (Tr. p. 265); that he discussed the possibility of a merger between General Host and Armour with Ashton, Downey and Lob (Tr. p. 273); that he and

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1/ A Vice President of Allen Inc., working under Herbert A. Allen.

McDowell fully studied, reviewed and read the Prospectus (Tr. pp. 262-274) and that he discussed with McDowell the changes concerning the possible sale by General Host of Armour assets and combining Armour with General Host (Tr. p. 277).

39. Herbert A. Allen further testified that he knew that the management of Armour was antagonistic to General Host (Tr. p. 262) and that he was relying on General Host's ability to "win over a majority of the board" of Armour on a voluntary basis but that he did not get into the legality of how General Host might obtain such operating control of Armour's Board on a non-voluntary basis because "the Host people weren't paying me for that" (Tr. pp. 261-262). He further testified that he studied all facts in the Prospectus (Tr. p. 263); that he relied on a prior experience with another company, National General, in his belief that General Host would obtain operating control of Armour's Board of Directors through a consentual arrangement (Tr. pp. 266-268) and that with respect to National General taking control of great American Holding "they went in and made a similar request and made it very clear that it was in the best interests of directors of the company that those who owned the majority of the stock be so represented. Usually, that it enough to put the directors on the alert. I shouldn't say usually, but it had been my experience just prior to that" (Tr. p. 271).

40. Allen further testified that it was part of Allen Inc.'s job to perform a full review of the Prospectus and that that was their obligation (Tr. p. 274).

41. Day testified that he discussed with Downey, General Host's counsel, that a majority of theArmour board of directors would be required to propose a merger between Armour and General Host (Tr. p. 111) and that prior to February 14, 1969 he had discussed with Downey, provisions for page 9 of the Prospectus under the heading "Other Aspects of the Exchange Offer", that he had inquired of Downey as to the legal implications of the statements contained on page 9 and that he was told that in order to get control of Armour, General Host "would have to have a majority of the board of directors." (Tr. p. 106).

42. Ashton testified that prior to February 21, 1969 General Host proposed a resolution to convene a special meeting of shareholders of Armour pursuant to the request of 25% or more of Armour's shareholders. (Tr. p. 461).

43. Ashton further testified that following the completion of the Exchange Offer, by agreement between Armour and General Host, the resolution to convene the special meeting was declared out of order, four General Host representatives were placed on Armour's board and General Host reserved its rights under the resolution (Tr. pp. 461-462). Ashton further testified that following the February 21, 1969 meeting General Host "did not do anything to implement" the resolution. (Tr. p. 462).

44. Day testified that following the consummation of the Exchange Offer, General Host was unable to get control of the Board of Directors of Armour because of the staggered board and cumulative voting provisions (Tr. pp. 102-103).

45. Prior to January 30, 1969 Armour publicly raised certain questions concerning General Host's future ability to pay its debts in the event of a successful Exchange Offer (Exh. 23, p. 8, A-42). In response thereto Glynn testified that to "assure management, Mr. Ashton and Mr. Pistell and the board that we would have sufficient cash available to meet all our obligations" an internal cash flow analysis was prepared covering two years, 1969 and 1970. (Tr. pp. 481, 420-421, Exh. 24). The said cash flow analysis was not prepared on the basis of historical earnings but rather incorporated General Host projections of what it might earn for those future years. (Tr. p. 477). In addition, the cash flow projection did not include as an obligation $9.4 million due to certain insurance companies, payment of which was accelerated by them and made payable in or before August, 1969 (Tr. pp. 237-238, 480). The cash flow analysis did not make provision for any capital expenditures for the years 1969 or 1970 (Exh. 24, Tr. pp. 236-243).

46. Day testified that if General Host obtained 51% ownership of Armour, the interest payments required on the General Host debentures would have to come from internally generated funds of General Host plus the dividends, whatever they might be, from Armour and that these two items would not support the interest payments "for any extended period of time" and that additional financing would be required to take care of these payments. Day further testified that dividends from Armour would have to be either increased as one alternative or there "would have to be divestitures within General Host to finance payments of interest for any extended period of time" (Tr. p. 115).

47. General Host's Prospectus contained the following representations concerning capital expenditures:

"Capital Expenditure Program

In 1967 the Company spent more than $8,000,000 for expansion of capital facilities, including new ovens, machinery and equipment for baking plants, trucks and other vehicles, additional frozen storage capacity, new and renovated restaurants and coffee shops, renovation and improvement of tourist facilities at Yellowstone and Everglades and completion of the Frontier West tourist operation at Houck, Arizona.

The Company has continued its capital expenditures program during 1968, spending close to $6,000,000 for substantially increasing the frozen convenience food facilities of Van de Kamp's, establishing additional Van de Kamp's coffee shops, continuing the automation and modernization programs for baking facilities of Van de Kamp's Bond and Eddy, building new lodging units, dining facilities, camper service facilities and gift shops, modernizing landscaping and improving existing guest and tourist facilities of Yellowstone and Everglades, and building additional Li'l General convenience stores.

The Company progress to continue its capital expenditures program during 1969 using funds to be derived from retained earnings and accumulated depreciation. There can, however, be no assurance that this program will continue on schedule because it depends in part on funds to be generated by operations."

48. The Prospectus omitted to state that General Host's internal cash projections for the years 1969 and 1970 were prepared on the basis of prospective, not historical earnings. In addition, the Prospectus omitted to state if General Host had included in its cash requirements for the years 1969 and 1970 the repayment of $9.4 million of indebtedness to the insurance companies and/or the requirements for its capital expenditure program at the same rate as the immediately preceding two years, that even through the use of Projected earn-

ings its internal cash flow would have been insufficient to meet its debt obligations as they became due (Exh. 23).

49. Bettauer[1] testified that in his discussions with the management of General Host they stated that if General Host acquired 51% of the stock of Armour but less than 80% that "they would be headed for a difficult time" (Tr. p. 148).

50. Armour had instituted an action to enjoin General Host from completing the Exchange Offer alleging that General Host securities being offered were unsound (A-42). General Host's Prospectus stated in part that "on January 27, 1969 Armour's application for a temporary restraining order was denied by the Court. The Court set a hearing date of February 4, 1969 on Armour's motion for a preliminary injunction against the Exchange Offer. In the opinion of counsel for the Company, there appears to be no merit to the contentions presented in this action". (Exh. 23, pp. 8-9). In addition, General Host's Prospectus makes reference to proceedings instituted by Armour before the Illinois Securities Commissioner seeking to restrain the Exchange Offer because of an alleged "lack of soundness" of the Exchange Offer. The Prospectus further stated "in the opinion of counsel for the Company, there appears to be no merit to the contentions presented in this proceeding (Exh. 23, pp. 8-9). General Host failed to further state that on the basis of historical performance the Armour allegations were true, that General Host was relying upon projected earnings to satisfy its debt obligations from internally generated funds and that its ability to continue its capital expenditure program as represented on page 22 of the Prospectus might have to be curtailed in order to satisfy its debt obligations

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[1]The partner at Price Waterhouse & Co., General Host's auditors, in charge of the General Host account.

even on the basis of projected earnings. Although at page 22 the Prospectus states "there can however be no assurance that this program (capital expenditure) will continue on schedule because it depends in part on funds to be generated by operations", it omits to state that the said ability to continue the program would be in further jeopardy because of the debt being created by virtue of the Exchange Offer. (Exh. 23, p. 22).

51. Ashton testified that he was not relying solely upon internally generated funds to meet his future debt requirements but that he could do several other things including liquidating portions of General Host's assets to raise needed capital (Trans. pp. 420-426). This possibility was not adequately disclosed in the context of the company's ability to continue its capital expenditure program but was limited primarily to the possible impact of the United States government's anti-trust action as set forth under the section "Anti-Trust Aspects" on page 9 of the Prospectus (Exh. 23).

52. The General Host Prospectus contained pro forma combined statements of General Host and Armour financial reports. (Exh. 23, pp. 10-18).

53. Glynn testified "the SEC has for many years made it an absolute requirement that where you are making an Exchange Offer of this type or in any other business combination transactions, that pro forma statements be provided giving effect to the proposed transactions, and that the assumptions upon which the statement are prepared be set forth clearly" (emphasis supplied) (Tr. p. 219).

54. Bettauer testified that Accounting Research Bulletin

51 states that "if there is the inability to exercise control ... a consolidated ... presentation shall not be used" (Tr. p. 153).

55. The pro forma combined presentation in the Prospectus did not contain a clear statement of the "assumptions" under which they were employed. In the introductory portion thereto there should have been a statement that:

> "General Host may not be able to obtain operating control of Armour unless it can elect a majority of the board of directors of Armour. In order to do so, absent the consent of Armour's existing board of directors, who have thus far expressed a resistance to General Host's assumption of management of Armour, or General Host's ability to change Armour's existing by-laws which may require court proceedings to accomplish, Armour's staggered board and cumulative voting provisions may prevent General Host from electing a majority of Armour's board of directors until the expiration of at least three annual meetings of Armour shareholders, if ever. Therefore, the combined treatment of these financial statements shall not be read to give the impression that General Host necessarily will have the ability to make use of Armour assets, direct the policies of Armour management or cause Armour to increase its dividends".

56. Mr. Steven Elgart, a witness called by the defendants, and an expert on Economic Forecasting, testified that in 1968 the forecasts were that the economy would not do well in 1969 (Tr. p. 512) and that economic money rates and money availability forecasts cannot be made with any degree of certainty (Tr. p. 513).

57. As a result of the Exchange Offer and its prior acquisition of Armour securities, General Host owned 3,656,800 share of Armour Common Stock (or their equivalent in the form of Armour convertible debentures), upon the expiration of the Exchange Offer. If the Armour convertible debentures owned by General Host had been

converted into Armour Common Stock in accordance with their terms, General Host would have owned approximately 55% of the then outstanding Armour Common Stock. (Stip. ¶49).

58. As a result of the tender offer and other purchases, Greyhound's subsidiary acquired 2,096,040 shares of Armour Common Stock, representing approximately 32% of the then outstanding shares of Armour Common Stock. (Stip. ¶51).

59. On June 24, 1969, Greyhound and Host announced an agreement in principle pursuant to which Host agreed to sell and Greyhound agreed to purchase Host's stock interest in Armour. Thereafter, Greyhound advised Host that it was unable to complete the agreement on the terms it had negotiated. On September 11, 1969, Host and Greyhound announced a new agreement pursuant to which Host agreed to sell and Greyhound agreed to purchase Host's stock interest on different terms. A written contract embodying these terms was executed by the parties on October 27, 1969. On May 14, 1970, the Interstate Commerce Commission entered an order approving Greyhound's purchase of Host's stock interest in Armour. The closing pursuant to this written agreement of purchase and sale took place May 14, 1970. (Stip. ¶53).

Proposed Conclusions of Law

60. General Host's Exchange Offer Prospectus was materially false and misleading in that

(a) It failed to set forth the serious risks and impediments to General Host's ability to obtain operating control of Armour's Board of Directors;

(b) It failed to set forth the various conditions and impediments to General Host's ability

to cause the sale of Armour assets, increase Armour's dividends, merge Armour and General Host, and elect Armour's management, and failed to disclose the risks to investors inherent in those conditions and impediments;

(c) It failed to set forth that General Host was relying upon projected earnings rather than historical results to meet its cash flow requirements out of internally generated funds;

(d) It failed to disclose that even on the basis of projected earnings General Host could not meet its cash requirements out of internally generated funds if it included in its cash requirements the repayment of $9.4 million of debt to insurance companies or the expenditures of funds for capital improvements in amounts which had been historically required;

(e) It omitted to state the assumptions upon which General Host was including pro forma combined financial statements of Armour and General Host; and

(f) It failed to disclose that in order to merge Armour and General Host, Delaware law required the approval of at least 2/3 of Armour's shareholders as well as a resolution of Armour's Board of Directors.

61. The General Host Exchange Offer Prospectus contained material misstatements in that it represented that "upon consummation of the Exchange Offer" General Host could sell assets

held by Armour or cause Armour to raise its dividends when, in fact, other steps would be required to permit General Host to dictate those corporate actions.

62. The failure to disclose the information set forth in ¶61 above and the misrepresentations set forth in ¶61 above were material omissions and material misrepresentations in that a reasonable investor might have and would have considered them important in making his decision whether or not to tender his Armour stock to General Host.

63. General Host, Allen Inc., Ashton, Pistell and Downey either knew the material facts noted in ¶60 and ¶61 that were misstated or omitted and knew or should have realized their significance or failed or refused to ascertain and disclose such facts when they were available to them or could have been discovered by them with reasonable effort.

64. The acts complained of constitute violations of §10(b) and §14(e) of the Securities and Exchange Act of 1934, as amended, §17(a) of the Securities Act of 1933, as amended, and the Rules and Regulations promulgated thereunder.

Dated: New York, New York
April 28, 1975.

MILBERG & WEISS

By _____
A Member of the Firm

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661-3200

JA 626 Fma-288-0481

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN,	:	
Plaintiff,	:	
-against-	:	73 Civ. 573 (EW)
GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON F. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,	:	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	:	

Defendants respectfully request that the Court make the following findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

1. Allen & Company and Allen & Company, Inc. ("Allen Inc.") were at all relevant times entities separate and distinct one from the other. Allen & Company and Allen Inc. did share a common back office operation and cooperate in other aspects of the business of each, but overall they were not so interrelated as to make them in reality but a single entity or departments of a single entity.

2. The Prospectus of General Host Corporation ("General") dated January 30, 1969 (the "Prospectus") was reviewed and cleared by the full Securities and Exchange Commission ("SEC") for and prior to dissemination to the public.

3. The full SEC also reviewed and cleared a proxy statement which was filed with it on December 16, 1968 by General. The material included in said proxy statement was also included verbatim in the Prospectus.

4. In the Institutional Investors Study Report of the Securities and Exchange Commission (1971), the SEC described and commented upon the General acquisition of Armour and Company ("Armour") securities (see Volume 5, pages 2799-2807), stating, in part, "Host's failure to consummate the final stages of the [acquisition] strategy was due to circumstances which could not have been foreseen in the Summer and Fall of 1968 when the report [Confidential Report on Armour & Company] was written." (Vol. 5 at 2801) Said Study Report does not challenge the sufficiency of the disclosure of information to the public concerning the issues raised by plaintiff herein.

5. Prior to SEC clearing of the prospectus, counsel for Armour communicated with the SEC on several occasions to express opposition to the General registration. The deficiencies urged upon the Commission by Armour in opposition to the registration included: alleged misstatements or omissions as to the inadequacies of the offer; the subordinated and long term nature of the debentures; the lack of protective covenants restricting debt loans to others; investments in others and minimum working capital. Armour pressed that the debentures and warrants are unsound. It charged the unlikelihood that General Host would be able to pay principal and interest as due, based on (1) the projected cash flow of General Host after the exchange offer; (2) the net tangible assets of General Host after the exchange offer; (3) the terms of the debentures; and (4) the implications of the 1920 Packers' consent decree.

6. Nowhere in the Prospectus is it stated that General would gain immediate control of the Armour Board of Directors if the General exchange offer for Armour ("the exchange offer") were successful.

7. The Prospectus disclosed, at page A9 thereof:

> "To the best knowledge of General, there are presently 17 directors of Armour. The terms of 6 directors expire in 1969, 5 in 1970, and 6 in 1971. In addition, Armour has cumulative voti[illegible]."

8. Nowhere in the Prospectus is it stated that General could or would finance the exchange offer from operating income and/or cash on hand.

9. The financial and other statements contained in the Prospectus clearly indicate the respective size and financial status of General and of Armour.

10. Any reasonable investor by comparing the statements contained in the Prospectus as to General with those contained in the Prospectus as to Armour would or should have known that Armour was approximately 10 times as large as General.

11. Nowhere in the Prospectus is a specific market value stated for the debenture/warrant package offered by General in the exchange offer.

12. That the market value of the debenture/warrant package offered by General in the exchange offer could not be factually known at the time of the Prospectus would necessarily be inferred by a reasonable investor from the statement in the Prospectus, at page 8, that, "None of the debentures or warrants to be issued in the exchange offer are outstanding and therefore there is no established market for them."

13. The Prospectus fairly and adequately disclosed the existence and nature of the then-existing opposition to the General exchange offer.

14. The Prospectus did not misrepresent or state in a misleading fashion any facts which would have been important to the decision of a reasonable investor with regard to the General exchange offer.

15. The Prospectus did omit to disclose any fact which would have been important to the decision of a reasonable investor with regard to the General exchange offer.

16. Prior to the date of the Prospectus, there had been several recent acquisitions wherein the acquired company had a "staggered" Board of Directors and/or cumulative voting and the acquiring company nonetheless promptly gained control of the Board of Directors of the acquired company.

17. At the time of the Prospectus, General had no reason to believe that it or its shareholders would be harmed if General were required to wait slightly more than two years before obtaining control of the Armour Board of Directors.

18. At the time of the Prospectus, General had a reasonable basis for believing that it might obtain control of the Armour Board of Directors in less than two years.

19. At the time of the Prospectus, based on the money market prevailing at and prior to that time, General had no reason to believe that it would be unable to obtain on acceptable terms the financing necessary to complete its program to obtain control of Armour.

20. At the time of the Prospectus, General had no reason to believe that its debentures and warrants to be used in the exchange offer would not be listed on the New York Stock Exchange and Pacific Coast Stock Exchange or that the absence of such listing would adversely affect the value of said warrants and debentures.

21. Through the month of January, 1969, while the registration was being processed, Armour publicly attached the General Host proposal, and its views were widely disseminated. The news media, based on press releases issued by the Armour group, published the specific claims that it was very unlikely General Host would be able to pay principal and interest on the subordinated debentures; that the value of the warrants was illusory, and that the tax consequences to Armour stockholders would be adverse. A full-page advertisement addressed to Armour stockholders by the Chairman of the Armour board, published in the Wall Street Journal, the New York Times and other news media throughout the country, denigrated the General Host securities and went into considerable detail as to the undesirability of the exchange. His statement raised questions whether General Host would have the cash flow necessary to service its greatly increased debt and touched upon other claimed deficiences.

22. By reason of the statements contained in the Prospectus and the public statements made by Armour during the month of January, 1969, a reasonable investor should have known that Armour had a "staggered" board and cumulative voting, which might prevent General from obtaining immediate control of the Armour board even if General's exchange offer were successful, and that General would have to obtain moneys from sources other than cash on hand and operating income to successfully complete its program to acquire Armour.

23. Allen Inc.'s involvement in the General exchange offer was limited to functioning ministerially as co-dealer-manager of said offer.

24. Defendants did not exhibit a willful, deliberate, reckless disregard for the truth in making any of the statements contained in the Prospectus.

CONCLUSIONS OF LAW

25. The Prospectus did not misrepresent, omit to state, or state in a misleading fashion any material fact with regard to the General exchange offer.

26. At the time of the Prospectus, the rules and practice of the SEC would not have permitted the inclusion therein of speculation as to General's potential future cash flow.

27. The complaint herein should be dismissed as to all defendants, with costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN L. SPIELMAN, Plaintiff, - against - GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON F. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY MC CAW, EDWIN C. MC DONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE F. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY, Defendants.	73 Civ. 573 EW DEFENDANTS' POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants respectfully request that the Court make the following findings of fact and conclusions of law:

PROPOSED FINDINGS OF FACT

1. In December, 1968, General Host ("Host") owned 1,002,500 shares, or approximately 16-1/2%, of the common stock of Armour then outstanding. 750,000 shares had been acquired by Host in two blocks of 150,000 and 600,000 shares, respectively, from Gulf & Western Industries, Inc. The additional 252,500 shares had been purchased in the open market. (SF. 24, SF. 25; Tr. 394-95, Ashton)

2. On December 13, 1968, Host publicly announced that it was considering the possibility of an exchange offer for additional Armour securites (the "exchange offer"). (SF. 32)

3. On December 16, 1968, a proof of a proxy statement for a special shareholders meeting to approve an exchange offer

for Armour securities and to authorize the issuance of securities of Host for use in connection with said offer was filed with the Securities and Exchange Commission ("SEC"). After review and clearance by the SEC, on or about December 27, 1968 said proxy statement ("the Host proxy statement") was mailed to Host shareholders for a January 20, 1969 meeting. (SF. 35; Tr. 393-94, 396, Ashton)

4. On December 23, 1968, Host announced that it would offer to exchange for Armour securities its 7% subordinated debentures and warrants to purchase Host common stock. (Tr. 394, Ashton; Ex. A-15(1); SF. 33)

5. On December 30, 1968, Host filed with the SEC a registration statement and prospectus (the "prospectus") concerning a proposed offering of $346,200,000 aggregate principal amount of 7% subordinated debentures due February 1, 1994 and 8,655,000 warrants expiring January 31, 1979 to purchase Host common stock at $45 per share. The debentures and warrants were to be offered in exchange for common stock of Armour in the ratio of $60 principal amount of debentures and 1-1/2 warrants for each share of Armour common stock. The proposed exchange offer provided that Host would not accept any tender of Armour securities unless upon acceptance of all tendered securities it would own more than 50% of the then outstanding Armour common stock assuming conversion of all Armour 4-1/2% debentures tendered. Amendment No. 1 to the registration statement as filed on January 23, 1969 increased the aggregate principal amount of debentures being offered to $347,040,000 and the total number of warrrants to 8,676,000 and amended the proposed exchange offer to include Armour's outstanding 4-1/2% convertible subordinated debentures. Amendment No. 2 to the

registration statement as filed on January 29, 1969 increased the number of warrants to 14,460,000 and reduced the exercise price of the warrants to $40 per share. The ratio of exchange was changed to $60 principal amount of debentures and 2-1/2 warrants for each share of Armour stock or for Armour debentures in the principal amount ($51.14) then required upon conversion to obtain one share of Armour common stock. (Tr. 396, Ashton; SF. 37; Exs. A-18, A-19, A-46, A-89)

6. The prospectus (Ex. 23) was declared effective by the Commissioners of the SEC on January 30, 1969. All of the disclosure contained in the December, 1968 Host proxy statement concerning the proposed exchange offer was also included in the prospectus, using the same language. The prospectus stated, at page 1:

> "On January 28, 1969 the last reported sale price for General Host Common Stock on the New York Stock Exchange was $39.63 per share, and the last reported price for Armour Common Stock on the New York Stock Exchange was $65.00 per share."

The prospectus further stated at page 31:

> "The [Host] Warrants [being offered in the exchange offer] will be issuable in registered form to purchase the number of shares of [Host] Common Stock set forth thereon at an exercise price of $40 per share. The exercise price of the Warrants may be reduced from time to time at the discretion of [Host's] board of directors for limited periods (of not less than twenty-one days) by an amount not in excess of 33-1/3% of the exercise price then in effect as an inducement for exercise of the Warrants when deemed appropriate for [Host] to obtain the cash proceeds resulting therefrom. (The purpose is to benefit [Host] and its equity holders by making it possible to induce Warrant holders to exercise their Warrants when this appears to the Directors the most

> economical or otherwise desirable way to raise new equity capital if it should be considered necessary or desirable to raise new equity capital.)".

The prospectus further stated, at page 3 thereof:

> "The principal amount of General Host Debentures may be applied in payment of the exercise price of the Warrants regardless of the then market value of the Debentures."

(SF. 38; Ex. 23; Ex. A-42(F), A-51)

7. On January 27, 1969, while the Host Registration Statement was still on file with the SEC and had not become effective, the Greyhound Corp. ("Greyhound"), through a subsidiary, offered to purchase up to 41% of Armour's common stock for cash, at a price of $65 cash per share, retaining the option to accept more than 41%. On January 27, 1969, Armour sent a letter to its stock and debentureholders transmitting the Greyhound tender offer to them. Advertisements announcing Greyhound's tender offer were published in the Wall Street Journal and other major newspapers throughout the United States on January 28, 1969. On January 31, 1969, Greyhound's offer was increased to $70 cash per share. On February 10, 1969, Greyhound increased its offer to $72 cash per share and announced that it would accept all shares tendered. (SF. 43; Exs. A-35, A-37, A-44, A-54, A-55, A-63, A-68)

8. The exchange offer commenced January 30, 1969 and terminated February 14, 1969. As a result of the exchange offer and its prior acquisitions of Armour securities, Host owned 3,656,800 shares of Armour common stock (or equivalent in the form of Armour convertible debentures), upon the expiration of the exchange offer. If the Armour convertible debentures owned by Host had been converted into Armour common stock

in accordance with their terms, Host would have owned approximately 55% of the then outstanding Armour common stock. By its competing offer Greyhound had acquired approximately 32% of Armour shares. (SF. 41, SF. 49, SF. 51; Ex. 23)

9. On January 23, 1969, Armour and an individual purporting to be an Armour shareholder commenced an action entitled Armour and Company & McClure Kelley v. General Host, et al, 69 Civ. 279 (the "1969 action") in this Court alleging, among other things, that Host, its directors and dealer-managers were engaging in conspiracies and acts in violation of the securities laws, and seeking to enjoin the making and consummation of the exchange offer. The motion of plaintiffs in the 1969 action for a preliminary injunction came on for hearing before this Court on February 5, 1969. In their complaint and in support of the aforesaid motion, plaintiffs in the 1969 action presented substantially similar arguments which have been presented by the present plaintiff concerning Host's alleged failures to make disclosure concerning its cash flow and alleged inability to service its debts from cash flow. By opinion dated February 7, 1969, the Court denied said motion (SF. 39; Exs. A-42 (A) through (C))

10. During the month of January, 1969, counsel for Armour sent letters to forty-eight state Blue Sky Commissioners concerning the proposed Host exchange offer. (SF. 42, SF. 44, SF. 45, SF. 46, SF. 47, SF. 48)

11. Counsel for Armour wrote letters and memoranda attacking and/or questioning the proposed Host exchange offer to the SEC on December 10, 1968, December 16, 1968, January 2, 1969, January 6,1969 (two letters), January 23, 1969, January 24, 1969, February 6, 1969 and February 7, 1969

(Exs. A-11, A-13, A-21, A-22, A-23, A-32, A-34, A-58 and A-60 respectively). The aforesaid December 10, 1968 (Ex. A-11) letter stated at page 2:

> "We believe that the high debt-equity ratio of General Host (presently between four and five-to-one) raises important questions as to its sources of repayment of its large borrowings.

The aforesaid January 2, 1969 memorandum (Ex. A-21) stated at page 6:

> "Please bear in mind that Armour has a 17-man classified Board of Directors divided into three classes with 3 year terms and cumulative voting, and that accordingly, General Host cannot elect a majority of Armour's directors until at least the second annual meeting after completion of the exchange offer, and perhaps, not until after the third annual meeting.
>
> "We would think that in a situation of this kind a proxy statement or prospectus should show rather explicitly the projected source of funds to service new indebtedness . . ."

12. On December 31, 1968, William Wood Prince, Chairman of Armour, was quoted in the Wall Street Journal as commenting on the proxy statement that:

> ". . . the Deparment of Justice had indicated to General Host that in its view the acquisition or control of Armour by General Host under present circumstances would violate this decree [Meat Packers' Decree of 1920]. Accordingly, it may become necessary or desirable for General Host to modify, dispose of, or agree to dispose of, a substantial part of its assets and business."

The article goes on to quote Mr. Prince's statement of the opinion of Armour's counsel as follows:

> ". . . General Host Corp. would have to dispose of substantially all, if not all, of its present businesses prior to any attempt to gain control of Armour. Under such circumstances, the entire General Host proxy statement and the proposed offer are meaningless balderdash." (Ex. A-20)

13. On January 9, 1969, a letter was sent by Armour's management to all of Armour's stockholders of record as of January 2, 1969, containing the following language:

> "General Host Corporation, a company with a top-heavy debt structure, approximately 1/10th the size of Armour in sales and profits, has filed a Registration Statement covering an exchange offer it proposes to make to Armour stockholders in an effort to obtain control of Armour.
>
> * * *
>
> ". . . the primary purpose of this letter is simply to make sure that every Armour stockholder understands the very substantial risks involved in irrevocably tendering any shares to General Host until the . . . accounting, debt service and other problems inherent in this offer have been resolved or clarified.
>
> * * *
>
> "Since almost all of General Host's operations are dependent upon products specifically forbidden by the Consent Decree, in our opinion and that of our Counsel, before General Host could exercise control of Armour, it would have to liquidate virtually its entire business.
>
> * * *
>
> "If General Host elects to dispose of its present business, the pro forma combined statements of income presented in its Registration Statement are meaningless. However, even as presented, these statements raise disturbing questions as to the ability of General Host to pay interest and amortization on its huge debt. Also, they do not take into account the fact that General Host estimates it will spend up to about $9 million in expenses in making the offer. Interest on this amount, which is almost 25% of General Host's net worth, would substantially reduce net income. Nor do the figures of per share earnings reflect the dilution from the potential exercise of up to 8,655,000 stock purchase warrants which is over three times the number of shares outstanding.
>
> "As now set forth in General Host's Registration Statement, the tabulation of pro forma combined earnings figures indicates that before

> extraordinary items General Host alone earned $1.00 per share in the 52 weeks ended October 5, 1968, that if General Host acquires 40% of Armour (which would not permit the consolidation of their accounts for accounting purposes) General Host's earnings would become a deficit of $1,201,000 before extraordinary items, which would be equivalent to earnings of 28 c[ents] per share assuming conversion of General Host's convertible notes, and that if General Host acquires as much as 60% of Armour (which would permit the consolidation of their earnings for accounting purposes) these earnings before extraordinary items would be $1.20 per share.
>
> "But these figures do not mean that General Host would have the cash flow necessary to service its greatly increased debt.
>
> "For so long as there continue to be any public stockholders of Armour, even if General Host were in control of Armour's Board of Directors, which is classified and elected for three-year terms, General Host could not use Armour's assets and cash flow -- except by the declaration of dividends -- to service General Host's indebtedness."

On January 9, 1969, and the following day the text of this letter, again addressed to Armour stockholders appeared as a full-page advertisement in major newspapers, including the New York Times and the Wall Street Journal. (Exs. A-25, A-26; SF. 36)

14. On January 17, 1969, Armour's management sent a proxy statement to its stockholders for its February 21, 1969 annual meeting. Said proxy statement contained the following language (page 2):

> "Six directors are to be elected at this meeting for terms of three years each. At the election each holder of record will have cumulative voting rights exercisable in person or by proxy, and accordingly the proxies named in the accompanying form of proxy may distribute the total number of votes represented by the proxies they hold (determined by multiplying the number of shares represented thereby by the number of directors to be elected) among all or any of the nominees in such manner as they in their discretion determine." (Ex. A-29)

15. On January 24, 1969, Armour was reported in the New York Times to have stated that a complaint filed in this Court by Armour and one of its shareholders alleged that:

> ". . . it was unlikely that General Host would be able to pay the principal amount and interest on the non-convertible, subordinated $60 principal amount of debentures it proposed to offer Armour stockholders . . . " (Ex. A-34(1))

16. On February 7, 1969, the Wall Street Journal reported Armour's attorneys as saying the Host offer was "inequitable". In the same article, an attorney for the Kentucky Securities division was quoted as saying that a petition of Armour called the state's attention to an alleged failure of Host to disclose "material information". (Ex. A-62)

17. On February 10, 1969, Armour published a full-page advertisement in the New York Times and Wall Street Journal in the form of a letter "To Armour Shareholders". It contained a financial table purporting to illustrate Host's "cash deficits" of $3,611,000 and $5,269,000 at 51% and 60% ownership of Armour. It went on to argue in detail that Host's historical operations would not generate sufficient cash to meet interest requirements in the absence of a merger, and warned that the terms of the debentures and warrants being offered did not prevent the issuance of more senior debt or other equity securities. Copies of said letter/advertisement were on February 10, 1969 also mailed by Armour to all Armour shareholders together with a supplemental Armour proxy statement for the meeting of Armour stockholders to be held on February 21, 1969. (SF. 36; Exs. A-64, A-65)

18. Upon the trial of the present action, plaintiff presented evidence on the following issues only:

(a) a "failure . . . to emphasize or set forth the problem with respect to [Host's] not obtaining effective operating control [of Armour immediately] because of the [Armour] staggered board of directors and cumulative voting" and

(b) that the prospectus did not state that Host was "relying upon projections to meet the interest on [Host's] debt service as it became due." (Tr. 331-332, 372-373, 379)

No evidence was offered by plaintiff on any other issue.

19. Nowhere in the prospectus is it stated that Host would gain immediate control of the Armour board of directors if the exchange offer were successful. (Ex. 23)

20. The prospectus disclosed, at page A9:

> "To the best knowledge of [Host], there are presently 17 directors of Armour. The terms of 6 directors expire in 1969, 5 in 1970, and 6 in 1971. In addition, Armour has cumulative voting." (Ex. 23, p. A9)

The prospectus, at page 10, specifically invited the reader to refer to the Annex in which the foregoing statement was contained. It stated the following under the heading "Information Concerning Armour":

> "See Annex A to this Prospectus for information concerning Armour and the financial statements of Armour." (Ex. 23, p. 10)

21. The prospectus disclosed, at page 9:

> "On January 21, 1969, General Host won complete dismissal of a legal action instituted the day before by the Department of Justice in the United States District Court for the Northern District of Illinois. This action had sought to enjoin General Host from proceeding with the Exchange Offer or from otherwise acquiring additional shares of Armour stock. It had been based upon the theory that a 1920 Packers' Consent Decree which resulted from an earlier lawsuit against Armour (United States v. Swift and Company, et al.) is or could be made applicable

to General Host Corporation. The Federal Court rejected this theory and held that this Decree does not forbid acquisition by General Host of a controlling stock interest in Armour. Although an appeal of this decision could be made to the United States Supreme Court, the Department of Justice has not indicated whether it will appeal the decision. The decision in this case does not foreclose the Department of Justice from bringing an entirely new lawsuit based upon the general anti-trust laws. However, there has been no indication that the Department intends to bring such an action.

"To resolve this matter, if any Department of Justice appeal is successful or if the Department were to succeed in some other action, the Company may find it necessary or desirable to dispose of all or a part of its currently operating businesses or all or a part of its stock in Armour." (Ex. 23, p. 9)

22. Upon successful completion of the exchange offer, Host required a maximum of three annual meetings which were scheduled to take place in approximately two calendar years after the offer to obtain a majority of Armour's directors.(Tr. 415, Ashton; Ex. 23)

23. At the time of the exchange offer, Host reasonably believed that, if it obtained a majority of Armour's common stock, it might obtain control of the Armour board of directors in less than the maximum time required for Host to elect a majority of the Armour directors. Among the bases for Host's belief were the following:

(a) some incumbent Armour directors might resign rather than oppose a majority shareholder and/or fellow Armour directors, and some Armour directors might subsequent to the exchange offer be persuaded to cooperate with Host in the best interest of all Armour stockholders. Directors of Great American Holding Company had only recently resigned following a successful take-

over bid by National General Corporation. Host's management was familiar with other instances of this type; and

(b) Armour's by-laws might be amended to increase the size of the board, in which event Host would elect a majority of the additional directors. Both Host's regular counsel and special Delaware counsel had advised Host that the size of Armour's board of directors could be increased by vote of the shareholders without consent of the board of directors. (Tr. 268-72, Allen; Tr. 107-108, Day; Tr. 416-418, 447-452, Ashton; Ex. A-61)

24. The evidence demonstrates that the degree to which the staggered board and cumulative voting were emphasized in the prospectus was an accurate reflection of their importance to a reasonable man at the time in the circumstances then existing.

25. At the time of the exchange offer, the Rules and practice of the SEC did not require or permit the disclosure of cash flow projections in a prospectus. At the time of the exchange offer, Host provided to the SEC and discussed with the SEC projections which Host had made of its future cash flow. The SEC made no request, however, that these projections or any other projections of Host's future cash flow or any disclosure of Host's historical cash flow be included in the prospectus. (Tr. 473, 481-482, 490-91, Glynn)

26. Nowhere in the prospectus is it stated that Host could or would finance the exchange offer from cash flow from operations. (Ex. 23)

27. At the time of the exchange offer, Host reasonably believed that in the event cash flow from its operations was not sufficient, it would be able to obtain on acceptable terms the financing necessary to complete its program to obtain control of Armour. The basis for such belief was the existence of the following options:

(a) Host had $9 million in existing working capital available to it; (Tr. 171, Bettauer);

(b) Host could draw funds under an existing $6 million loan commitment; (Tr. 424-25, Ashton);

(c) Host could sell or hypothecate $200 million worth of Armour stock; (Tr. 428, Ashton; Tr. 483, Glynn);

(d) Host could sell or hypothecate its other assets, which had been valued at $80 million by Laird & Company; (Tr. 421, 426, Ashton; Tr. 483-84, Glynn);

(e) Host could have forced conversion of the debenture it was offering in the exchange offer (Tr. 421-22, Ashton) and/or;

(f) Host could have issued new equity securities. (Tr. 424, Ashton)

Host could have exercised any one or more of the aforesaid options without having control of or the concurrence of the Armour board of directors.

28. Pro forma combined financial statements for Armour and Host were included in the prospectus at the request of the SEC. (Tr. 219, 472, Glynn)

29. Plaintiff offered no evidence at trial that the pro forma combined financial statements of Armour and Host contained in the prospectus presented any inaccurate information.

30. The prospectus disclosed at page 9:

"Other Aspects of the Exchange Offer

> General Host reserves the right in its sole discretion to make offers subsequent to the expiration of the Exchange Offer for shares of Armour Common Stock or for Armour Debentures on a cash or exchange-of-securities basis or a combination thereof, by merger, or otherwise, which offers could differ in terms from the Exchang Offer described herein.
>
> General Host intends to act promptly both before and after consummation of the Exchange Offer to obtain control of the board of directors and management of Armour. In this connection it may engage in the solicitation of proxies for the election of directors of Armour and other matters, both at the February 21, 1969 annual meeting of Armour and Company and otherwise.
>
> General Host may find it desirable upon consummation of the Exchange Offer to propose to stockholders of the relevant corporations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of portions of the assets presently held by it or by Armour. If no such merger or consolidation occurs, and if General Host has not acquired more than 80% of Armour's Common Stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour, or to incur new indebtedness or issue additional equity securities.
>
> The acquisition of a majority of the Common Stock of Armour will be accounted for as a purchase. Price Waterhouse & Co., the Company's independent accountants, have reviewed the foregoing accounting treatment and approved it as being in accordance with generally accepted accounting principles." (Ex. 23, p. 9)

31. Allen & Co. and Allen & Company Incorporated ("Allen Inc.") were at all relevant times entities separate and

distinct one from the other, and there is no evidence indicating that Allen & Co. was involved in the Exchange Offer.

32. Allen Inc.'s involvement in the exchange offer was as a co-dealer-manager of said offer. (SF. 12; Exs. 23, A-49)

33. At the time of the exchange offer, by reason of disclosures contained in the prospectus and other public information, the shareholders of Armour knew or should have known that Armour had a staggered board of directors and cumulative voting and that Host might not have adequate cash flow from operations to finance an acquisition of operating control of Armour.

34. The prospectus did not misrepresent or state in a misleading fashion any fact which might or would have been important to the decision of a reasonable investor with regard to the exchange offer.

35. The prospectus did not omit to disclose any fact which might or would have been important to the decision of a reasonable investor with regard to the exchange offer.

36. Defendants acted in good faith and with reasonable care in making and limiting the statements contained in the prospectus.

37. None of the defendants exhibited a willful, deliberate or reckless disregard for the truth in making and limiting the statements contained in the prospectus.

38. All facts which might or would have been important to an Armour stockholder in making a decision as to the exchange offer were effectively disclosed by statements contained in the prospectus and in other public documents including the proxy statement, the supplemental proxy statement, letters and newspaper

advertisements which were specifically called to the attention of Armour's stockholders by Armour.

CONCLUSIONS OF LAW

39. The prospectus did not misrepresent, omit to state, or state in a misleading fashion any material fact with regard to the exchange offer.

40. All material facts with regard to the exchange offer were effectively disclosed to Armour stockholders.

41. Each defendant has fulfilled any and all duties to which he or it may be held.

42. Each defendant acted in good faith and with reasonable care.

43. None of the defendants exhibited a willful, deliberate or reckless disregard for the truth.

44. Allen & Co. is not liable for any alleged act or omission of Allen Inc.

45. The complaint herein should be dismissed as to all defendants, with costs.

Respectfully submitted,

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General Host, Ashton, Alden, Binns, Scott, and Hamilton

SHEA, GOULD, CLIMENKO, KRAMER & CASEY

and

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Allen & Company Incorporated

HAVENS, WANDLESS, STITT & TIGHE
Attorneys for Defendant
Richard C. Pistell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

ALAN L. SPIELMAN,

Plaintiff,

- against -

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY MC CAW, EDWIN C. MC DONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN S. MANUS, CECIL MANUS and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

Index No.
73 Civ. 573 (EW)

PRETRIAL ORDER

- -X

On April 9, 1975, the parties in this action by their attorneys appeared before Magistrate Schreiber at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and agreed as follows:

1. The parties agree that the trial of this action should be based upon this order and upon the pleadings herein.

2. The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevance to the issues):

3. STIPULATED FACTS

The parties stipulated that the following facts are not in dispute in this action, but each party reserves the right to object to the relevance or materiality of any such stipulated fact:

1. In or about July, 1968, General Host's principal business was the manufacture and distribution of bread and other food products. Its stockholders' equity was approximately $35 million.

2. In or about 1964, and prior thereto, Allen Co., of which the sole general partners were Charles Allen and Herbert Allen, was engaged in various aspects of the securities business although it was not generally engaged in the retail sale of securities. All of the partners were either members of the Allen family or trusts for members of the Allen family. Among the functions performed by Allen Co. were municipal and government bond trading, block trading, third market functions and market making in over-the-counter securities, underwriting, and investment of their own funds. In 1964, Allen Co. caused the formation of Allen Inc. During all relevant times, a majority of the common stock of Allen Inc. was owned by general and limited partners (or a spouse) of Allen Co. Allen Inc. was formed to take over all functions of Allen Co. other than the private investment of Allen Co. assets. However, certain functions such as over-the-counter trading and municipal and government bond trading have not as yet been transferred to Allen Inc.

3. The stockholders of Allen Inc. who were also partners of Allen Co. or a spouse of a partner were the following:

Name	Percentage of Shares
Herbert A. Allen (general)	10.1%
Susan Allen Hayes (limited)	10.1%
C. Robert Allen, III (general)	10.1%
Bruce Allen (limited)	10.1%
Terry Allen Kramer (limited)	5.05%
Irwin Kramer	5.05%

Herbert Allen and Susan Allen Hayes are children of Herbert Allen. C. Robert Allen, III, Bruce Allen and Terry Allen Kramer are children of Charles Allen. Irwin Kramer is the husband of Terry Allen Kramer. All shares of Allen Inc. originally issued were issued at $10 per share, and, accordingly, the foregoing persons holding 50.5% of the stock of Allen Inc. paid $505,000 out of the initial capitalization of $1,000,000 for their stock. All of the remaining original stockholders of Allen Inc., numbering approximately 33, were employees of Allen Co. at the time they subscribed for the stock of Allen Inc. Substantially all of said persons continued as officers and/or employees of Allen Inc. or Allen Co. Certain of the non-Allen family stockholders of Allen Inc. who were also officers of Allen Inc. were at the same time employed by Allen Co. during relevant periods. Subsequent to the formation of Allen Inc., Allen Co. has, from time to time, made subordinated loans to Allen Inc. to provide necessary capitalization for particular large underwritings. Said subordinated loans were repaid following the conclusion of said underwritings.

4. Subsequent to the formation of Allen Inc. in 1964 and during all relevant times, it was the function of Allen Inc., among other things, to act as underwriters, investment bankers, dealer managers and merger specialists. Allen Co. acted as over-the-counter traders, traders in the third market and municipal and government bond traders.

5. Between 1964 and through the times of the acts alleged in the plaintiff's complaint, Allen Inc. and Allen Co. maintained offices at the same business location and shared a common back office. The personnel in the back office performed services for both Allen Co. and Allen Inc. and for the most part are paid by Allen Co. All other persons (except for Herbert A. Allen and the Office of Supervisory Jurisdiction) are employed either by Allen Inc. or Allen Co., and officers and employees of Allen Inc. perform all services related to investment banking, corporate underwritings, tender offers, exchange offers and acquisitions. From time to time, Allen Co. participated in investment opportunities brought to it by Allen Inc.

6. Herbert A. Allen, the son of Herbert Allen, and a nephew of Charles Allen, was, during all relevant times, the president of Allen Inc. and a general partner of Allen Co. Certain office and other expenses, principally telephone and subscriptions, which could not be specifically applied to either Allen Co. or Allen Inc. were allocated. During relevant periods, such allocation was administratively recommended by Murray Lavin, a principal for purposes of the National Association of Securities Dealers, Inc. of Allen Co. and a Vice Chairman of the Board of Allen Inc. The final

decision as to any allocation was with the general partners of Allen Co. and the officers of Allen Inc.

7. During all relevant periods, the Board of Directors of Allen Inc. comprised 15 persons and Charles Allen was not such a director. Herbert Allen, C. Robert Allen, III, and Herbert A. Allen were directors. No other director was related by family to any of the partners of Allen Co. nor any member of the family of Allen Co. (except Irwin Kramer) but some were employed by Allen Co. Herbert Allen was Chairman of the Board.

8. During all relevant periods, Allen Inc. had approximately 45 officers.

9. During all relevant periods, all shares of Allen Inc. either owned by any partners of Allen Co. or any members of their family were voted for the aforesaid directors of Allen Inc. The Board of Directors of Allen Inc. managed the affairs of Allen Inc.

10. Allen Co. is authorized to do business only in the states of New York and New Jersey. Allen Inc. is authorized to do business in approximately 40 states.

11. During all relevant periods all transactions as dealer managers in connection with any exchange offer were performed by Allen Inc. and Allen Inc. received full compensation for all such services.

12. Allen Inc. was a dealer manager in connection with the exchange offer of General Host for securities of Armour and received all compensation paid by General Host as a dealer manager as aforesaid. Certain solicitor dealer checks were made out to Allen Co. and were paid over by Allen Co. to Allen Inc.

13. Allen Inc. and Allen Co. each file separately all reports with the Securities and Exchange Commission and the National Association of Securities Dealers Inc.

14. Allen Co. and Allen Inc. maintain completely separate bank accounts.

15. Allen Co. is a member of the National Clearing Corporation and Allen Inc. is not.

16. Allen Inc. acted as a managing underwriter of shares of common stock of General Host in May of 1967.

17. Allen Inc. acted as a managing underwriter for shares of common stock of Uncle John's Restaurants, Inc., 41% of the stock of which was owned by General Host, in August of 1967.

18. Allen Inc. acted as a managing underwriter of shares of common stock of General Host in April of 1968.

19. Allen Inc. acted as an agent, together with Kleiner, Bell & Co., Inc., on behalf of General Host in the sale of $47,400,000 principal amount of 5% Convertible Subordinate Notes due June 15, 1988, in a private offering which was closed October 15, 1968. Allen Inc. received $ 533,250.00 as its share of the fee paid therefor.

20. In 1968 Armour & Co. was a company whose common shares were traded on the New York Stock Exchange and whose principal business was the slaughter of livestock; processing, buying and selling of various food products; production and marketing of fertilizer; manufacturing and marketing of various soaps and other related products; producing and marketing of fatty acids and other similar products; the manufacturer and marketing of abrasives, adhesives and similar products; the tanning of hides and producing and market-

ing of various leather products; manufacturing and marketing of ethical pharmaceuticals and the manufacture and marketing of construction equipment. It was at that time the second largest meat packer in the United States and had a net worth and shareholders' equity of approximately $346 million.

21. Prior to July of 1968, Gulf & Western Industries, Inc. became the owner of 750,000 shares of Armour's outstanding common stock. Armour was subject to a United States Department of Justice 1920 Packers' Consent Decree which might have prevented the merger or consolidation of Gulf & Western and Armour. In or about July, 1968, Armour tendered for 1,500,000 of its own shares.

22. On or about August 5th, 1968 there was a meeting at which there were present representatives of General Host, Gulf & Western and Allen Inc. to discuss the sale of Gulf & Western Armour holdings to General Host.

23. On or about August 6, 1968, an agreement was entered into whereby General Host agreed to purchase 150,000 shares of Armour common stock at $56 per share and obtained an option to purchase the remaining 600,000 shares at $60 per share. General Host issued to Gulf & Western 175,000 General Host ten-year warrants exercisable at $30 per share in consideration for the said option. Subsequent to August 5, 1968, Allen Inc. formed a group of investors to take down a private placement of a new issue of $47.4 million of General Host 5% Convertible Subordinated Notes due 1988 to finance the purchase by General Host of certain shares of Armour securities from Gulf & Western.

24. The closing of the initial purchase of 150,000 shares of Armour shares from Gulf & Western took place on August 16, 1968. The closing of the purchase of the optioned 600,000 Armour common shares took place on October 15, 1968 and made General Host the holder of 12% of Armour's then outstanding stock.

25. On November 1, 1968, General Host entered into a loan agreement to borrow up to $20 million from banks to finance the purchase of additional Armour shares. Thereafter General Host borrowed $14 million under said loan agreement and purchased prior to December 30, 1968 an additional 252,000 shares. These purchases brought General Host's ownership of Armour stock to 1,002,500 shares representing approximately 16.5% of Armour's then outstanding common stock.

26. Up to at least December 30, 1968, the Directors and managers of Armour refused to meet with General Host's representatives for the purpose of discussing the possibilities of merger, or of General Host's influencing the policy of Armour, and further indicated a firm resistance to any attempt by General Host to so involve itself with Armour.

27. Substantially identical note purchase agreements were executed by all purchasers of the $47,400,000 of 5% Convertible Subordinate Notes due June 15, 1988.

28. In or about September, 1968, pursuant to instructions by Harris J. Ashton, then President of General Host, a study was drafted entitled "Confidential Report on Armour and Company", and dated October, 1968 ("Confidential Report"). During October, 1968,

the Confidential Report was seen by Richard C. Pistell, Harris J. Ashton and the Department of Justice.

29. General Host mailed to its stockholders on or about September 13, 1968, proxy material for a special meeting of stockholders to approve issuance of shares upon conversion of the $47,400,000 of 5% Convertible Subordinate Notes due June 15, 1988, to be held on October 10, 1968, at which meeting the stockholders of General Host approved the issuance of said additional shares.

30. General Host received a copy of the letter referred to in Item 14 of General Host's document designation in November, 1968.

31. On November 25, 1968, Armour's counsel urged the SEC to investigate whether General Host should be registered as an investment company.

32. In early December, 1968, Armour's counsel conferred with SEC officers relative to General Host's stock acquisitions in Armour, followed by a letter to the Commission's general counsel. This letter, among other matters, and admittedly upon hearsay, charged violations of the Securities Exchange Act of 1934 and urged an investigation and action by the SEC. On January 3, 1969, Armour's counsel again conferred with SEC officers following which they sent to the SEC a detailed memorandum "in order that the Staff may consider carefully why we consider the Registration Statement and the Proxy Statement to be misleading both to the stockholders of General Host and to the offeree stockholders." By letter dated January 6, 1969 addressed to the Honorable Manuel F. Cohen, Chairman of the SEC, Armour's counsel brought the contentions to the

notice of Chairman Cohen "so that the Staff review of the Registration Statement will not be carried out under any summary or accelerated procedure, and so that members of the Commission itself are aware of the material deficiencies in the Registration Statement". On January 9, 1969, Armour caused to be published full page advertisements in the Wall Street Journal and the New York Times which advertisement was in the form of an open letter to Armour shareholders expressing management's opposition to the Host exchange offer. On or about January 9, 1969, Armour sent to its stockholders a letter with text that appeared in the newspaper advertisements mentioned above. Host filed an amendment to its previously filed Schedule 13D with the SEC dated December 12, 1968, reporting that General Host was considering the possibility of obtaining control of Armour. This was the first 13D filing.

33. On December 23, 1968, General Host announced an exchange offer for securities of Armour in exchange for 7% Subordinated Debentures of General Host and warrants to purchase General Host common stock.

34. General Host, during the processing of the Registration Statement, either upon request of the SEC or upon its own initiative, submitted data, supplements, admittances and other matters as to questioned items and in support of the registration of the securities.

35. Proxy material was mailed by General Host to its stockholders on or about December 27, 1968 for a special meeting of stockholders to be held on January 20, 1969 to authorize the exchange offer for securities of Armour. Supplemental proxy material

for said meeting was mailed on January 9, 1969 and January 14, 1969. The special meeting of stockholders of General Host was held on January 20, 1969, at which time the stockholders of General Host authorized the exchange offer for securities of Armour.

36. A notice and proxy statement was mailed by Armour management to the holders of common stock of Armour as of January 2, 1969 on or about January 17, 1969 for the annual meeting of stockholders of Armour to be held on February 21, 1969. Under date of February 10, 1969, supplemental proxy material was mailed to Armour stockholders which included a reprint of a newspaper letter to Armour stockholders dated February 10, 1969.

37. General Host's Registration Statement as filed with the SEC on Form S-1 on December 30, 1968 related to a proposed offering of $346,200,000 7% Subordinated Debentures due January 31, 1994 and 8,655,000 warrants expiring January 31, 1979 to purchase General Host Common Stock at $45 per share. The debentures and warrants were to be exchanged for common stock of Armour in the ratio of $60 principal amount of debentures and 1-1/2 warrants for each share of Armour Common Stock. Amendment No. 1 to the Registration Statement as filed on January 23, 1969 increased the principal amount of Debentures being offered to $347,040,000 and the Warrants to 8,676,000 so as to include in offering not only for Common Stock of Armour but Armour's outstanding 4-1/2% Convertible Subordinated Debentures. Amendment No. 2 to the Registration Statement as filed on January 29, 1969 increased the number of Warrants to 14,460,000 and reduced the exercise price of the Warrants to $40 per share. The ratio of exchange was changed to $60 principal amount of 7%

Subordinated Debentures due February 1, 1994 and 2-1/2 Warrants for each share of Armour stock or for the principal amount of Armour Debentures (presently $51.14) required upon conversion to obtaining one share of Armour stock.

38. The Commission, not the staff pursuant to delegated authority, declared the Registration Statement effective on January 30, 1969.

39. In January 1969 Armour and an individual purporting to be an Armour shareholder instituted a class action alleging, among other things, that General Host, its Directors and Dealer-Managers were engaging in conspiracies and acts in violation of the securities laws, and sought to enjoin the making and consummation of General Host's Exchange Offer ("Armour and Kelley litigation"). The said action was based upon General Host's initially filed S-1 which was filed with the SEC on December 30, 1968.

40. During the pendency of the Armour and Kelley litigation, General Host filed on January 29, 1969 with the SEC Amendment No. 2 to its Registration Statement and Prospectus which contained many changes from the original version. The Registration Statement became effective and operative for use by General Host in soliciting tenders from Armour shareholders.

41. Pursuant to the Exchange Offer, which by its terms expired February 14, 1969, General Host acquired 2,654,300 shares of Armour Common Stock or their equivalent in Armour convertible debentures. In this Exchange Offer, General Host issued $159,258,060 of its 7% Subordinated Debentures due February 1, 1994 and 6,635,753

warrants to purchase General Host Common Stock at $40 per share, expiring January 1, 1979.

42. On January 23, 1969, Sullivan and Cromwell sent identical letters to 48 state Blue-Sky Commissioners re: "General Host Corporation - Armour and Company Exchange Offer."

43. On January 27, 1969, while the General Host Registration Statement was still on file with the SEC and had not become effective, the Greyhound Corp. ("Greyhound"), through a subsidiary, offered to purchase up to 41% of Armour's common stock for cash, at a price of $65 per share, retaining the option to accept more than 41%. On January 27, 1969, Armour sent a letter to its stockholders transmitting the Greyhound tender offer to them. Advertisements announcing Greyhound's tender offer were published in the Wall Street Journal and other major newspapers throughout the United States on January 28, 1969. On January 29, 1969, Greyhound's offer was increased to $70--cash--per share, and thereafter increased to $72--cash--per share, with the further announcement that it would accept all shares tendered. On or about January 30, 1969, General Host filed an Amendment to its S-1 Registration Statement, increasing its Exchange Offer from 1-1/2 warrants to 2-1/2 warrants to purchase General Host Common Stock at $40 per share and permitting the use of the General Host debentures to be applied at face value in payment of the exercise price of the warrants.

44. On January 18, 1969, Sullivan and Cromwell sent a letter to R. M. Mett, Office of the Commission of Securities, Madison, Wisconsin, re: "Possible Filing in Wisconsin of Application for Qualification of Certain Securities of General Host Corporation.

45. On January 27, 1969, Sullivan and Cromwell sent a letter to MacDonald Gallion, Securities Commissioner, Montgomery, Alabama, and 11 other state Blue-Sky Commissioners.

46. On January 27, 1969, Sullivan and Cromwell sent a letter to James L. McKenna, Chief, Bureau of Securities, Newark, New Jersey and two other identical letters to state Blue-Sky Commissioners.

47. On January 27, 1969, Sullivan and Cromwell sent a telegram to Stanley R. Hays, Securities Commissioner, Denver, Colorado, re: "General Host Corporation Exchange Offer to Common Stockholders of Armour & Co.", also addressed to four other state Blue-Sky Commissioners.

48. On January 28, 1969, Sullivan and Cromwell sent a letter to Claude Keeler, Jr., Director of Securities, Phoenix, Arizona, re: "General Host Corporation Exchange Offer to Common Stockholders of Armour & Co." and 10 other identical letters to state Blue-Sky Commissioners.

49. As a result of the Exchange Offer and its prior acquisitions of Armour securities, General Host owned 3,656,800 shares of Armour Common Stock (or their equivalent in the form of Armour convertible debentures), upon the expiration of the Exchange Offer. If the Armour convertible debentures owned by General Host had been converted into Armour Common Stock in accordance with their terms, General Host would have then owned approximately 55% of the then outstanding Armour common Stock.

50. On February 13, 1969, a letter from Greyhound Food Management, Inc. was sent to Armour shareholders.

51. As a result of the tender offer and other purchases, Greyhound's subsidiary acquired 2,096,040 shares of Armour Common Stock, representing approximately 32% of the then outstanding shares of Armour Common Stock.

52. At the Armour Annual Meeting held on February 21, 1969, General Host elected four of the six directors being elected at such meeting.

53. On June 24, 1969, Greyhound and Host announced an agreement in principle pursuant to which Host agreed to sell and Greyhound agreed to purchase Host's stock interest in Armour. Thereafter, Greyhound advised Host that it was unable to complete the agreement on the terms it had negotiated. On September 11, 1969, Host and Greyhound announced a new agreement pursuant to which Host agreed to sell and Greyhound agreed to purchase Host's stock interest on different terms. A written contract embodying these terms was executed by the parties October 27, 1969. On May 14, 1970, the Interstate Commerce Commission entered an order approving Greyhound's purchase of Host's stock interest in Armour. The closing pursuant to this written agreement of purchase and sale took place May 14, 1970.

54. In order for General Host to be afforded substantial tax savings, General Host would have had to attain 80% ownership of Armour's outstanding common stock.

4. ISSUES

The issues of the plaintiff are as follows:

1. Was the Registration Statement and Prospectus issued by General Host in connection with General Host's Exchange Offer for Armour securities materially false and misleading and violative of Sections 10(b) and 14(e) of the Exchange Act and Section 17 of the Securities Act with respect to the following statements amd omissions?

a. The cover page and page 3 of the Prospectus stated that General Host was offering for each share of Armour common stock a package of $60 principal amount of debentures and 2-1/2 warrants (each warrant to purchase 1 share of General Host common stock) for each share of Armour common stock. (The debentures being subordinated and due February 1, 1994, bearing 7% interest per annum and useable at its face value for conversion of the warrants into General Host common stock and hereafter referred to as "General Host Debentures"). The said statement was materially misleading in that it failed to disclose that the defendants knew that the said debentures would trade on the open market at a substantial discount from the face amount of each debenture;

b. At page 3, the representation is made that

> "The Company has applied for listing of the debentures on the New York Stock Exchange and the Pacific Coast Stock Exchange, and the warrants on the American Stock Exchange and the Pacific Coast Stock Exchange."

No statement is made that in the event said listing applications were denied that the market value of the ability to sell said debentures and warrants would be materially adversely affected. In fact, the said listing applications were denied by the New York Stock Exchange and the American Stock Exchange due to the inability of General Host to satisfy those Exchanges of its ability to meet its debt service obligations as they became due.

c. At page 8, under the heading "Basis for Determination of the Exchange Offer", the statement is made that

> "In arriving at the Exchange Offer, General Host has taken into consideration the relative financial positions and recent operating results of General Host and Armour and the businesses of each. Consideration was also given to the market values of their securities and to the $70 offer to purchase 41% of Armour's Common Stock by the Greyhound Corporation . . ."

Said statement was materially false and misleading in that it was intended to demonstrate that the General Host securities package would have a market value in exeess of the $70 Greyhound cash counter-offer if General Host's Exchange Offer was successful. General Host represented in the Prospectus that its Exchange Offer would be successful if it obtained at least 50% of Armour's outstanding common stock (including the approximately 1,000,000 shares of Armour common stock already owned by it). Said statement materially omits to state that in the event General Host failed to obtain immediate

operating control of a majority of Armour's Board of Directors and a 2/3 vote of Armour shareholders to permit the merger of Armour and General Host after consummation of the Exchange Offer, that the General Host securities package would be worth substantially less than $70 and that General Host would be either forced to sell its Armour holdings at a substantial loss or substantially liquidate its own operations in order to continue to carry the said investment;

d. At page 8 under the heading "Position of Armour's Present Management", a statement is made that

> "The present management of Armour has announced its opposition to the Exchange Offer . . . "

and fails to state that that same opposition was expressed by the Board of Directors of Armour;

e. At page 8 under the heading "Position of Armour's Present Management", there is a description of a lawsuit brought against General Host, its directors and financial officers and its Dealer-Managers entitled "Armour and Company, et al. vs. General Host Corporation, et al." Said description is materially misleading in that it omits to state:

(i) that the said action was instituted as a class action on behalf of all Armour shareholders,

(ii) that the plaintiffs in said lawsuit charged the defendants with material omissions in the Prospectus and the nature of those omissions (including a charge that General

Host could not meet its financial obligations in the event of a successful tender) and

(iii) that a partner of General Host's auditing firm, Price Waterhouse & Company, testified at a hearing described in said paragraph before the federal court on a motion for a preliminary injunction and at a hearing described in the aforementioned paragraph conducted by the State of Illinois, that in his opinion General Host's use of earnings projections as opposed to historical results in determining its future cash flow and ability to service its debt, was improper, and that in his opinion General Host could not meet the debt service obligations being incurred by virtue of its acquisitions of Armour securities. When describing proceedings before the Illinois Securities Commissioner as based upon

> ... the alleged lack of soundness of the Exchange Offer."

the Prospectus fails to set forth the reasons for said contention and does not alert the reader that the Exchange Offer was being attacked on the basis that General Host might not have the ability to meet its debt obligations as they became due in the event more than 50% of Armour's common stock was obtained but no merger was effected;

i. At page 9 under the heading "Other Aspects of The Exchange Offer," the representation was made that

> "General Host intends to act promptly both before and after consummation of the Exchange Offer to obtain control of

> the Board of Directors and management of Armour. In this connection it may engage in the solicitation of proxies for the election of directors of Armour and other matters, both at the February 21, 1969 Annual Meeting of Armour & Company and otherwise."

Said statements were materially false and misleading in that they conveyed to the reader that through "the solicitation of proxies" General Host would have the power to elect a majority of the board of directors of Armour. It omits to state that Armour had staggered board and cumulative voting provisions and that at the February 21, 1969 meeting only six of seventeen directors would be up for election with five more directors to be elected the following year and six at the third succeeding annual meeting thereby limiting the maximum number of directors that could be placed on Armour's Board by proxy solicitation at the February 21, 1969 meeting, assuming 100% of the vote, to only six directors. It also omitted to state that in the event Greyhound succeeded in obtaining at least one-third of the outstanding common shares of Armour by virtue of its tender offer and the existing Armour directors refused to resign, General Host could not get operating control of Armour's Board of Directors for at least two years and seven days thereby preventing General Host from controlling the Board of Directors and designating management of Armour for at least that period of time;

g. At page 9 under the heading "Other Aspects of the Exchange Offer", the statement is made that

> "General Host may find it desirable upon consummation of the Exchange Offer to propose to stockholders of the relevant corpora-

> tions the merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, but General Host may find it desirable to dispose of portions of the assets presently held by it or Armour."

The Prospectus failed to advise Armour shareholders that a merger between General Host and Armour could not be accomplished under the laws of the State of Delaware, where Armour was incorporated without a vote of a majority of Armour's directors and at least 2/3 of the outstanding shares of Armour voted in favor of the merger and that there was no assurance that General Host could obtain 2/3 of Armour's outstanding stock pursuant to the Exchange Offer. In addition, it further failed to advise the Armour shareholders that in order to propose such a merger or to dispose of Armour assets, even with 2/3 ownership of Armour's shares, a majority of the members of Armour's board of directors would have to vote for such a proposal (which could only be done if it was determined to be in the best interests of Armour, not General Host) and that by virtue of Armour's staggered board and cumulative voting provisions General Host's ability to elect a majority of Armour's board of directors would most probably be blocked for at least three annual meetings of Armour's shareholders;

b. At page 9 under the heading "Other Aspects of the Exchange Offer", it is represented that

> "If no such merger or consolidation occurs, and if General Host has not acquired more than 80% of Armour's Common Stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid

> on Common Stock by Armour, or to incur new indebtedness or issue additional equity securities."

Said statement is materially misleading in that it represents that General Host, having achieved a more than 50% ownership of Armour common stock, would have the power to cause the dividend on Armour common stock to be increased. It failed to state that only the board of directors had power to increase dividends which therefore required General Host to control more than 50% of Armour's board of directors, and that it could not insure such control until the expiration of at least three Armour annual meetings, and further that the dividend could not be increased to suit the needs of General Host without regard to the business necessities and interests of Armour and its minority shareholders without exposing Armour and General Host to liability to such Armour minority shareholders;

i. All of the statements contained under the heading "Other Aspects of the Exchange Offer" led the Armour shareholders to believe that in the event General Host obtained more than 50% of Armour's outstanding shares it would, immediately following the Exchange Offer,

(i) control more than 50% of Armour's board of directors,

(ii) have the ability to increase Armour dividends,

(iii) have the ability to cause the sale of certain Armour assets,

(iv) cause the merger of Armour and General Host, and

(v) change the management of Armour.

Said representations were materially false and misleading since there were omitted therefrom the disclosures that Armour had a staggered board and cumulative voting and that if Greyhound obtained one-third of Armour's outstanding common shares and the existing board of directors of Armour refused to resign, none of the foregoing could have been accomplished until at least the expiration of three annual meetings of Armour shareholders;

j. Under the heading "Other Aspects of the Exchange Offer" was the representation that

> "The acquisition of a majority of the Common Stock of Armour will be accounted for as a purchase. Price Waterhouse & Co., the Company's independent accountants, have reviewed the foregoing accounting treatment and approved it as being in accordance with generally accepted accounting principles."

Said statement was materially false and misleading in that

(i) it implied that Price Waterhouse approved the inclusion of the Pro Forma Combined Statements of Income and Balance Sheets of General Host and Armour & Company appearing on pages 14 through 18 of the Prospectus;

(ii) that Price Waterhouse found no material objection to the General Host Exchange Offer, and

(iii) that the other representations under the same heading were not misleading.

It omitted to state that the Price Waterhouse partner in charge of the General Host audit did not consider it proper to present the General Host and Armour income statements and balance sheets on a combined or consolidated basis unless General Host could within one year of the reports control Armour, and that a partner of Price Waterhouse in charge of the Armour audit had testified that he did not believe that General Host could, on the basis of his cash flow analysis, meet, as it became due, its debt service which would arise from General Host's acquisitions of Armour securities, unless 80% was acquired.

k. On pages 10 through 18, the Prospectus set forth various pro forma combined presentations of General Host and Armour with respect to earnings, book value per share, statements of income and balance sheets. The presentation of those pro forma combined statements was predicated upon the possibility of General Host becoming the owner of 50% or more of Armour common stock. Those presentations, both standing alone, and when read in connection with the representations contained under the heading "Other Aspects of the Exchange Offer" appearing at page 9 of the Prospectus, represented that with more than 50% ownership General Host would gain operating control of Armour's board of directors and management; have the ability to increase Armour's dividends or dispose of Armour's assets; merge General Host with Armour; make use of Armour's assets for General Host cash requirements and report the income statements and balance sheets of General Host and Armour on a

consolidated basis. Said representations were false and misleading because of Armour's staggered board and cumulative voting provisions; Greyhound's competing tender offer and Armour's directors and management resistance to General Host's takeover created serious doubts that General Host could obtain such control until the expiration of at least three annual meetings of Armour shareholders and even then, if a 2/3 vote of the shareholders could not be effected, there could be no merger.

1. The Prospectus omits to disclose the basis for General Host's belief that it could generate sufficient cash flow to service the indebtedness being incurred by virtue of its acquisitions of Armour securities and the requirements of its own business. Prior to and at the time of the issuance of the Registration Statement and Prospectus, General Host had prepared cash flow projections which made use of estimated future operating results to conclude that General Host could meet its debt service obligations as they became due. The reader of the Prospectus was not informed of the hypothetical basis for the use by General Host of such projections and could not make an informed business judgment as to whether or not said projections could be met. In addition, General Host $9,400,000 which said indebtedness would become payable in August, 1969 in the event General Host acquired more than 50% of Armour's outstanding common shares. General Host's

internal cash flow projections assumed that said indebtedness could be refinanced at the end of such period and on that basis reflected said indebtedness under "long-term debt" on page 13 of the Prospectus. In fact, such indebtedness was "short-term debt" due and payable in less than one year.

m. At page 11 under the heading "PRO FORMA EFFECT OF EXCHANGE OFFER ON GENERAL HOST PER SHARE BOOK VALUE" a series of book values per share for General Host common stock was presented which was materially false and misleading. It assumed that $47.4 million of convertible subordinated notes recently sold by General Host to a group of private investors had been converted into equity when in fact said indebtedness had not been converted into equity and was still being carried as debt on the company's balance sheet. Without giving effect to those convertible notes as having been converted into common stock, the book value of General Host per share would have been reduced "assuming 16.5% ownership of Armour" from $20.02 per share to only approximately $15 per share. In addition, the table of pro forma book value on page 11 of the Prospectus was materially false and misleading in that it did not adequately disclose that if General Host obtained more than 50% ownership of Armour, the General Host's tangible book value per share of common stock would be reduced to less than $3 at the 51% level and thereafter would become a negative tangible net worth at higher degrees of percentage ownership;

n. The Prospectus omits to warn Armour shareholders that General Host had predicated its ability to hold intact its Armour shares until such time as it could control Armour's board of directors or merge the two companies, upon a money market whose interest rates would remain at the level then existing. At the time of the issuance of said Prospectus the rates at which funds could be borrowed had substantially increased, and the rate and trend of such increases created serious doubts as to whether General Host could borrow funds at interest rates within its ability to pay. None of this was disclosed in the Prospectus. At the conclusion of the Exchange Offer General Host could not raise such funds at interest rates within its abilities to meet its debt obligations thereby creating pressure for it to liquidate its Armour holdings at substantial losses;

o. At page 10 of the Prospectus under the heading "EFFECT OF EXCHANGE ON ARMOUR STOCKHOLDERS WHO ACCEPT OFFER" the historical earnings of Armour between 1964 through 1968 were described as "... only $3.70, $2.51, $(0.04), $2.61 and $1.32, respectively." The said presentation was materially misleading in that through the use of the word "only", it wrongfully conditioned the reader to believe that Armour's most recent operating results were unsatisfactory. It also failed to inform the reader that the 1968 results of $1.32 per share were arrived at after deducting extraordinary items of

$1.83 per share. It further failed to disclose that Armour's income before extraordinary items for that fiscal period was $3.15 per share;

p. At page 10 of the Prospectus under the heading "EFFECT OF EXCHANGE ON ARMOUR STOCKHOLDERS WHO ACCEPT OFFER" a comparison of Armour's book value per share at November 2, 1968 of $39.23 was made with $60 principal amount of General Host debentures being offered pursuant to the Exchange Offer. Said comparison was materially misleading since it did not disclose that the defendants then knew that the said debentures would trade on the open market substantially lower than its face amount of $60;

q. The Prospectus was materially misleading in that it (i) omitted to state that if General Host's Exchange Offer was successful and it acquired more than 50% of Armour's stock, the result thereof would be to seriously impair General Host's debt/equity ratio and (ii) omitted a "Times Charges Earned" computation both historically and pro forma (giving effect to the proposed Exchange Offer) which would have indicated the insufficient coverage of General Host's interest obligations arising as a result of the Exchange Offer and prior indebtedness.

2. Did the defendants know, or should they have known, of the aforesaid misstatements and omissions?

3. Did the aforesaid misstatements and omissions cause damage to plaintiff and the members of the Class?

3(a) Are the defendants jointly and severally liable for acting pursuant to a conspiracy, scheme and course of conduct which violated Secs. 10(b) and 14(e) of the Exchange Act and Sect. 17 of the Securities Act?

(b) Are the individual defendants liable under Sect. 20 of the Exchange Act as "controlling persons" of General Host?

(c) Is Allen Co. individually liable by reason of its own acts or by virtue of being a "controlling person" and/or alter-ego of Allen Inc.?

The issues of the defendants, Host, Ashton, Alden, Binns, Hamilton, Scott, etc. are as follows:

1. Whether the alleged facts enumerated on pages 14 through 27 are facts and whether disclosure of them was material in the circumstances then existing.

2. Whether during the course of the Exchange Offer the material facts enumerated on pages 14 through 27 of plaintiff's memorandum were effectively disclosed.

3. Whether any misstatements or omissions which did occur were made willfully, deliberately or with reckless

disregard for the truth.

4. Whether any material misstatements or omissions which did occur in the prospectus were cured by other publications, disseminations and statements made to the public or to Armour shareholders.

The issues of the defendants Allen Co. and Allen Inc. are as follows:

1. Whether during the course of the Exchange Offer by General Host Corporation ("General Host") for securities of Armour and Company ("Armour") all material facts were effectively disclosed, particularly in light of the fact that, as a part of its program in opposition to the General Host Exchange Offer:

(a) Armour had made a "microscopic analysis" of the General Host Prospectus and, through written communications and meetings with the Securities and Exchange Commission ("SEC") had brought to the attention of the SEC "every conceivable shortcoming of the Offer or alleged fraudulent conduct or claimed violations of the Securities acts";

(b) Armour had caused to be widely disseminated in the news media its claims that, among other matters, it was very unlikely tha General Host would have the cash flow necessary to service the debt which General Host was to issue in connection with the Exchange Offer.

2. Whether in connection with the offering and

sale of General Host securities pursuant to the Exchange Offer, Allen Inc. acted with "willful, deliberate or reckless disregard for the truth."

3. Whether in connection with the offering and sale of General Host securities pursuant to the Exchange Offer, Allen Co. acted with "willful, deliberate or reckless disregard for the truth."

4. Whether Allen Co. is liable for any of the acts of Allen Inc. in this matter.

5. WITNESSES

The parties agree that the witnesses whom each party now intends to call, are those listed below. Should any party hereafter decide to call any additional witnesses prompt notice of their identity shall be given to the opposing party in writing, setting forth the reason why such witness was not heretofore identified. No witness may be called at trial unless identified as above stated.

(a) Plaintiff's witnesses are:

1. Harris J. Ashton - in person
2. Arthur Bettauer - in person and/or by deposition
3. Seymour Lazar - in person
4. Richard C. Pistell - in person
5. Carl A. Goldman, President, Corporate Capital Consultants, Inc., 1 State Street Plaza, New York, N.Y. 10004.Mr. Goldman will testify in person as a securities expert in connection with the valuation of the Exchange Offer and the material misstatements and omissions made in the Prospectus.
6. Irwin Schumer, a partner in Tunick & Platkin, 2 Park Avenue, New York, New York 10016, will testify in person as an accounting expert concerning various accounting matters relevant to the Prospectus including pro forma combined statements, cash flow matters, accounting aspects of current as opposed to long term debt obligations, and other accounting issues raised in this Pretrial Memorandum.
7. Carl Glick, a partner in David J. Greene & Co., 30 Wall Street, New York, New York, will testify in person as a securities expert on the same matters as to which Mr. Goldman will testify.
8. Timothy T. Day - in person and by deposition

9. Herbert A. Allen, Jr. - by deposition

10. John B. Glynn - by deposition

11. Alan C. McDowell - by deposition

(b) Witnesses for Defendants Host, Ashton, Alden, Binns, Hamilton, Scott, etc. are:

1. Harris J. Ashton

2. Arthur Bettauer - a partner at Price Waterhouse & Co., 60 Broad Street, New York, New York. Mr. Bettauer will testify as an accounting expert concerning various matters relevant to the prospectus.

3. Mark Borten

4. Timothy T. Day

5. William F. Downey

6. Steven J. Elgart - who is associated with Chase Econometric Associates, Inc. of Bala Cynwyd, Pa. Mr. Elgart will testify in person as a credit and banking expert. He will testify as to the availability and the cost of corporate credit in the years 1968 through 1970; he will also testify as to the financial condition of General Host at the times relevant to this lawsuit as well as the overall conditions of the money market at that time.

7. Joseph H. Flom

8. John P. Glynn

9. Brian E. Lorenz

10. James J. Murray

11. Richard C. Pistell

(c) Witnesses for Defendants Allen Inc. and Allen Co are:

1. Herbert A. Allen - in person

2. Alan S. McDowell - in person

3. Milton Filene - in person

4. Harry F. Reiss, Jr., Partner, Ernst & Ernst, 140 Broadway, New York, New York, will testify in person as an accounting expert comparing various accounting matters relevant to the Prospectus including pro forma combined statements, cash flow matters, accounting aspects of current as opposed to long-term debt obligations and other accounting issues raised in Plaintiff's Pretrial Memorandum.

5. Martin J. Whitman, President, M.J. Whitman & Co., Inc., 115 Broadway, New York, New York. Mr. Whitman will testify in person as a securities expert in connection with the evaluation of the Exchange Offer and disclosure made in the Prospectus and otherwise.

6. Richard Hochman, Vice President of E. F. Hutton & Co., Inc., One Battery Park Plaza, New York, New York, will testify in person as a securities expert in connection with the evaluation of the Exchange Offer and disclosure made in the Prospectus and otherwise.

7. Richard F. Corroon, a partner in Potter, Anderson, & Corroon, Wilmingston, Delaware, will testify in person as to the procedures available under Delaware law to obtain control of a corporation under circumstances when one holder owns more than 50% of the Common Stock thereof.